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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

SERVED 03/30/01

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Ann Marshall Young, Chair
Dr. Charles N. Kelber
Thomas S. Moore

In the Matter of NORTHEAST NUCLEAR ENERGY COMPANY (Millstone Nuclear Power Station, Units 2 and 3)	Docket No's. 50-336-LA and 50-423-LA ASLBP No. 00-783-09-LA March 29, 2001

MEMORANDUM AND ORDER

The Petitioners, Connecticut Coalition Against Millstone (CCAM) and STAR (Standing for Truth About Radiation) Foundation, seek to intervene in this operating license amendment proceeding on the application of Northeast Nuclear Energy Company (NNECO) to amend the technical specifications of its Millstone Units 2 and 3 located in Waterford, Connecticut.[1] The Applicant and the NRC Staff oppose the Petitioners' intervention petition, arguing that the Petitioners lack standing and that they have failed to proffer an admissible contention as

[1] See Connecticut Coalition Against Millstone and STAR Foundation Petition for Leave to Intervene and Request for Hearing (Sept. 8, 2000) [hereinafter Petition]; Connecticut Coalition Against Millstone and STAR Foundation Amended Petition for Leave to Intervene and Request for Hearing (Oct. 27, 2000) [hereinafter Amended Petition].

required by the Commission's Rules of Procedures.[2] For the reasons set forth below, we find that the Petitioners' sole proffered contention fails to meet the requirements of 10 C.F.R. § 2.714(b). Accordingly, the contention cannot be admitted and the intervention petition must be denied.

I. Background

On February 22, 2000, NNECO filed an application to amend Operating License DPR-65 for Millstone Unit 2, a Combustion Engineering nuclear steam supply system plant, and Operating License NPF-49 for Millstone Unit 3, a Westinghouse nuclear steam supply system plant. Subsequently, on August 28, 2000, the Applicant supplemented its application. Specifically, NNECO requests approval to relocate selected procedural details and their associated bases of each unit's Radiological Effluent Technical Specifications (RETS) dealing with the monitoring of routine operational releases to the Millstone Radiological Effluent Monitoring and Offsite Dose Calculation Manual (REMODCM) for each unit consistent with the Commission's technical specification improvements policy statement,[3] the NRC Staff's generic letter on this subject,[4] and the agency's improved standard technical specifications for plants

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[2] See Northeast Nuclear Energy Company's Answer to Request for a Hearing and Petition for Leave to Intervene (Sept. 25, 2000) [hereinafter NNECO Answer]; Northeast Nuclear Energy Company's Answer to Amended Petition to Intervene (Nov. 17, 2000) [hereinafter NNECO Second Answer]; NRC Staff's Response to Petition for Leave to Intervene and Request for Hearing Filed by the Connecticut Coalition Against Millstone and the STAR Foundation (Sept. 28, 2000) [hereinafter Staff Response]; NRC Staff's Response to Amended Petition to Intervene and Request for Hearing Filed by Coalition Against Millstone and STAR Foundation (Nov. 17, 2000) [hereinafter Staff Second Response].

[3] See "Final Policy Statement on Technical Specifications Improvements for Nuclear Power Reactors," 58 Fed. Reg. 39,132 (July 22, 1993). See also 60 Fed. Reg. 36,953 (July 19, 1995) (statement of considerations accompanying amendment of 10 C.F.R. § 50.36).

[4] See Generic Letter 89-01 (Jan. 31, 1989) "Implementation of Programmatic Controls for Radiological Effluent Technical Specifications in the Administrative Controls Section of the Technical Specifications and the Relocation of Procedural Details of RETS to the Offsite Dose Calculation Manual or to the Process Control Program."

like Millstone Units 2[5] and 3[6]. The Applicant's amendment application also seeks to add two new technical specifications to the administrative controls section of the technical specifications of each unit. The new administrative control technical specifications provide programmatic controls for radioactive effluent control and radiological monitoring programs in lieu of the relocated RETS requirements and mandate that the appropriate programs and operating procedures must be in place and conform to applicable regulatory requirements. NNECO's license amendment request does not involve any change to radiological release limits, radiological monitoring instrumentation, or radiological effluents for the Millstone plants. Similarly, the amendments do not impact the assumptions used in any accident analysis, affect any plant equipment, plant configurations, or the manner in which the plants are operated. Indeed, because of the programmatic controls contained in the new administrative controls technical specifications, future changes to the details of the REMODCM must meet the requirements of 10 C.F.R. § 50.59 or be the subject of a license amendment.

The Petitioners timely filed their intervention petition in response to the agency's notice of opportunity for hearing, 65 Fed. Reg. 48,744, 48,754 (Aug. 9, 2000), asserting that "[s]hould the amendment be granted, modifications to the instrumentation and surveillance mechanisms to monitor routine radioactive releases from Millstone Units 2 and 3 may thereby be effected [sic] without public notice and the opportunity for hearing." Petition at 2. According to the petition, CCAM is an organization consisting of numerous statewide organizations that advocate for safe and renewable energy sources and environmental protection, and its membership also includes families who own property and reside within the 5-mile priority evacuation zone around

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[5] See NUREG-1432 "Standard Technical Specifications, Combustion Engineering Plants" (Sept. 1992).

[6] See NUREG-1431 "Standard Technical Specifications, Westinghouse Plants" (Apr. 1995).

Millstone. Id. The petition states that the STAR Foundation is a not-for-profit organization based in East Hampton, New York, whose membership includes families that own property and reside within the Millstone 10-mile emergency evacuation zone. Id. In the petition, the Petitioners claim that if the amendment is granted their members "will suffer increased risk of hazard from radiological releases from Millstone Units 2 and 3 and consequent adverse health effects with no opportunity for comment or objection." Id. at 3.

Although not required to be filed at the time of their initial intervention petition, the Petitioners also included one contention in their petition. In pertinent part, the contention alleges that the relocation of selected RETS to the Millstone REMODCM will deprive Petitioners' members of notice and an opportunity for a hearing on proposed changes to the Millstone radiological liquid and gaseous effluent monitoring instrumentation. Id. at 4. It also asserts that the requested amendments will lower standards of radiological monitoring and "open[] the door to increases in the types and amounts of effluents that may be released offsite." Id. The contention concludes by stating that the Petitioners are prepared to establish through expert testimony that any increase in routine radiological effluents from Millstone will expose the public to greater risk of cancer, immunodeficiency diseases, and other adverse health effects. Id.

After NNECO and the Staff filed answers to the intervention petition, the Licensing Board issued a scheduling order setting a deadline by which the Petitioners could amend their petition and file their final contentions. See Licensing Board Order (Setting Schedule for Proceedings) (Oct. 6, 2000). Thereafter, on October 27, 2000, the Petitioners timely filed an amended petition essentially identical to their initial one. The amended petition, however, included the affidavit of Mr. Joseph M. Besade who indicates that he is a member of CCAM living about two miles from the Applicant's facility and that he has authorized the Coalition to represent him in the amendment proceeding. See Amended Petition, Affidavit of Joseph H. Besade (Oct. 26, 2000) at 13 [hereinafter Besade Affidavit]. In his affidavit, Mr. Besade asserts

that the grant of the license amendment will allow modifications to the instrumentation and surveillance mechanisms monitoring routine radiological releases at Millstone without public notice and an opportunity for a hearing. Id. at 13-14. The affidavit further states that the amendment would put Mr. Besade and his family at "increased risk of hazard from radiological releases from Millstone Units 2 and 3 and consequent adverse health effects with no opportunity for comment or objection." Id. Finally, the affiant states that he believes "that an increase in such radiological discharges, and a lowering of standards which limit such discharges, are contemplated in the present applications." Id. The Petitioners' amended intervention petition also indicated that it included the affidavit of another named individual, presumably a member of the STAR Foundation, but no such affidavit was included with the amended petition. On November 8, 2000, the Petitioners filed, without more, a corrected page to its amended petition substituting the name of a different member of the STAR Foundation and the affidavit of that individual essentially paralleling the affidavit of Mr. Besade.[7]

The Petitioners' amended intervention petition also included the affidavit of Mr. Joseph Mangano in support of their assertion in both their initial and amended petitions that any increase in routine radiological effluents from Millstone will expose the public to greater risk of cancer and other adverse health effects. In his affidavit, Mr. Mangano, who holds a masters degree in public health, states that he is a research associate with the Radiation and Public Health Project in New York City and that he has authored numerous technical studies, books, and reports related to radiation and its health effects. See Amended Petition, Declaration of Joseph Mangano (Oct. 27. 2000) at 5 [hereinafter Mangano Declaration]. In pertinent part, Mr. Mangano states that he is familiar with NNECO's license amendment application. Id. He asserts that the amendment will eliminate the opportunity for notice and hearing "regarding

[7] See Amended Petition, Affidavit of Christine Guglielmo (Nov. 7, 2000).

changes to the Millstone radiological liquid and gaseous monitoring instrumentation" and that "such instrumentation is critical in the prevention of radiological effluent releases to the environment and the monitoring of such releases." Id. at 6. Finally, the affiant claims that the people of Connecticut and Long Island are at risk of adverse health effects from radiological discharges at Millstone and that standards of effluent monitoring instrumentation should be tightened not loosened but, if the amendment is approved, "it is virtually certain that standards of effluent monitoring instrumentation, as such exist, will be lessened." Id.

II. Analysis

To intervene as a matter of right in a Commission licensing proceeding, section 189a of the Atomic Energy Act (AEA), 42 U.S.C. 2239(a), as well as the Commission's Rules of Practice, 10 C.F.R. § 2.714(a)(1), require that a petitioner demonstrate that its "interest may be affected" by the proceeding. In ascertaining whether a petitioner has established the requisite "interest" to intervene, the Commission long ago held that contemporaneous judicial concepts of standing are to be applied. Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976). In addition to establishing its standing, the Commission's Rules of Practice also require that a petitioner proffer at least one admissible contention in order to become a party to the proceeding. 10 C.F.R. § 2.714(b)(1); Duke Energy Corporation (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 333 (1999). Although normal practice is to address the issue of the Petitioners' standing before turning to the question of the admissibility of contentions, here, because the Petitioners have proffered a single contention that we find fails to meet the contention requirements of 10 C.F.R. § 2.714(b)(2), there is no need to freight this decision with an analysis of the standing issues. Accordingly, we address only the question of the admissibility of the Petitioners' contention.

A. The Commission's Rules of Practice provide that "[e]ach contention must consist of a specific statement of the issue of law or fact to be raised or controverted." 10 C.F.R.

§ 2.714(b)(2). Additionally, section 2.714(b)(2)(i),(ii), and (iii) states that each contention must be accompanied by:

> (i) A brief explanation of the bases of the contention.
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> (ii) A concise statement of the alleged facts or expert opinion which support the 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.
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> (iii) Sufficient information . . . to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application . . . that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

The contention pleading criteria set forth in section 2.714(b)(2) are mandatory and must be scrupulously followed. As the Commission has stated with respect to these regulatory provisions, "[i]f any one of these requirements is not met, a contention must be rejected." Arizona Public Service Company (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991) (emphasis supplied); accord Oconee, CLI-99-11, 49 NRC at 335; see Final Rule, Rules of Practice for Domestic Licensing Proceedings - Procedural Changes in the Hearing Process, Statement of Considerations, 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989). The provisions of section 2.714(b)(2)(i),(ii), and (iii) were specifically added by the Commission "to raise the threshold bar for an admissible contention" and prohibit "notice pleading with the details to be filled in later" and "vague, unparticularized contentions." Oconee, CLI-99-11, 49 NRC at 334, 338. Further, it is the burden of the petitioner to come forward with contentions meeting the rules. Baltimore Gas & Electric Company (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-14, 48 NRC 39, 41 (1998). A licensing board is not free to supply missing information or draw factual inferences on the petitioner's behalf. See Palo Verde, CLI-91-12, 34 NRC at 155-56. As the Commission emphasized in its Statement of

Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 22 (1998), "[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)."

In addition to the contention pleading requirements of section 2.714(b)(2), a number of other long established principles of NRC adjudication bound the subject matter of contentions and thus affect their admissibility. Most fundamentally, licensing boards, as delegates of the Commission, only have jurisdiction over those matters the Commission commits to them in the various hearing notices and referral orders that identify the subject matters of the hearings and delegate to the boards the authority to conduct proceedings. Duke Power Company (Catawba Nuclear Power Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790 (1985); Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976). Accordingly, a contention is admissible only if it is within the scope of the proceeding outlined in the Commission's hearing notice and referral order. Wisconsin Electric Power Company (Point Beach Nuclear Plant, Units 1 and 2), ALAB-739, 18 NRC 335, 339 (1983). Further, a contention attacking or challenging a Commission rule or regulation is inadmissible and that inadmissibility bar necessarily applies to contentions advocating such things as additional or stricter requirements than those imposed by the regulations. 10 C.F.R. § 2.758; Oconee, CLI-99-11, 49 NRC at 334; Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-8, 29 NRC 399, 416-17 (1989); Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-87-12, 26 NRC 383, 395 (1987); Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982).

B. Assessing the Petitioners' proffered contention in light of the contention pleading requirements of section 2.714(b)(2) and these well established principles of NRC adjudication

makes it clear, as the Applicant and the Staff argue, that the contention must be rejected. To aid in that assessment, and to ensure there is no question as to precisely what the Petitioners' contention states and, equally important, what the contention fails to include, we set forth in full the Petitioners' two paragraph contention:

> "Relocating" the selected radiological effluent Technical Specifications and the associated Bases to the Millstone Radiological Effluent Monitoring and Offsite Dose Calculation Manual will deprive the public, and the membership of the Connecticut Coalition Against Millstone and STAR Foundation, of notice of proposed changes to the Millstone radiological liquid and gaseous effluent monitoring instrumentation. It will deprive them of the opportunity for hearing and to comment and object to changes, which can only be projected to lower standards of radiological effluent monitoring in the era of deregulation and electric restructuring. The amendment request is particularly objectionable in light of the record levels of radiological effluent released to the environment by the Millstone reactors.
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> This amendment will degrade protection of the public health and safety from radiological effluents. Even according to the applicant, NNECO, the amendment opens the door to increases in the type and amounts of effluents that may be released offsite as well as individual and cumulative occupational radiation exposures. NNECO's amendment requests states [sic] that such increases will not be "significant." (Application, Feb. 22, 2000, cover letter, page 3). However, as there will be no opportunity for hearing or public comment, the public will be exposed to greater risk of radiation doses from the routine operations of the Millstone nuclear reactors if NNECO obtains the amendment requested. The Petitioners are prepared to establish through expert testimony that any increase in routine radiological effluent to the air and water by the Millstone nuclear reactors will expose the public to greater risk of cancer, immunodeficiency diseases and other adverse health effects.

Amended Petition at 3-4.

Although it is not free of all doubt, it appears that the first paragraph of the contention sets out the issue the Petitioners seek to litigate in an attempt to comply with the requirement of section 2.714(b)(2), and the second paragraph sets out the bases for the contention in an attempt to comply with the requirements of section 2.714(b)(2)(i), (ii), and (iii). The issue the Petitioners raise in the first paragraph asserts that moving the RETS to the REMODCM will deprive the Petitioners' members of notice and an opportunity for hearing on the proposed changes "to the Millstone radiological liquid and gaseous effluent monitoring

instrumentation . . . which can only be projected to lower standards of radiological effluent monitoring." The second "bases" paragraph of the contention appears to focus on the alleged future deleterious health effects from the amendment by stating that it will degrade the protection of the public health and safety from "routine" radiological effluents by opening the door to increases in the types and amounts of effluents that may be released and expose the public to greater radiation doses from "routine" Millstone operations.

During a telephone prehearing conference in the proceeding, the Petitioners indicated that the issue they sought to raise in their contention was not the same legal issue involved in Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315 (1996), but rather "a mixed legal and factual issue." (Tr. 50). Regardless of how Petitioners characterize the issue they seek to raise, the Commission's Perry decision is instructive and aids in understanding the inadmissibility of Petitioners' contention.

The intervenor in Perry, like the Petitioners here, challenged the relocation of material from the technical specifications to a licensee-controlled document. Specifically, the Licensee sought a license amendment to transfer the withdrawal schedule for the reactor vessel material specimens from the plant's technical specifications to the facility's updated safety analysis report consistent with the NRC Staff's generic letter on this subject. Perry, CLI-96-13, 44 NRC at 316-17. Along with the removal of the withdrawal schedule from the technical specifications, the Licensee's amendment application, similar to NNECO's application here, included a new technical specification requiring that the reactor vessel material surveillance specimens be removed and examined in accordance with a specific regulation. Id. at 319. The intervenors in Perry proffered a legal contention raising a single legal issue. They claimed that the removal of the withdrawal schedule from the plant's technical specifications violated the notice and hearing requirements of section 189a of the Atomic Energy Act by depriving them of the opportunity for a hearing on future changes to the withdrawal schedule because such changes would be de

facto license amendments. Id. The Perry intervenors, however, conceded that there was no legal requirement that the withdrawal schedule remain in the plant's technical specifications. Id. at 320, 329.

In Perry, the Commission held, contrary to the intervenors' claim, that future changes to the withdrawal schedule would not be de facto license amendments because such changes would not permit the licensee to operate in any greater capacity than that prescribed by the original license. Id. at 327-28. The Commission concluded its decision by addressing the intervenors' assertion that they merely wished to participate in the regulatory process stating:

> If the Intervenors believed that the nature and significance of the material specimen withdrawal schedule was such that it needed to remain in the Perry technical specifications -- as a specific term of the Perry license -- the Intervenors could have raised that argument in this proceeding. They instead concurred with the NRC Staff that there is no statutory or regulatory requirement that the withdrawal schedule remain in the Perry license.

Id. at 329.

The Petitioners' contention here, similar to the intervenors' fatal concession in Perry, makes no claim that there is a statutory or regulatory requirement that the procedural details and associated bases of the Millstone RETS must remain as specific terms of the Millstone operating licenses. Such a claim is an indispensable element of any contention challenging the relocation of material from a plant's technical specifications to a licensee-controlled document because there can only be a right to a hearing on future changes to such material if there is a statutory or regulatory requirement that such matters be included in the plant's technical specifications in the first place. As the Commission stated in Perry, "there is no statutory or regulatory requirement that every operational detail listed in [a licensee controlled document] be subject to a technical specification." Id. at 328. And, as should be obvious, there is no general right to a hearing for a hearing's sake. Indeed, in indicating in Perry that the intervenors' challenge needed to show why the "nature and significance" of the material removed from a

plant's technical specifications must remain in the operating license, the Commission was merely using a shorthand expression for the required explanation of the nexus between the relocated material and either section 182a of the AEA or 10 C.F.R. §§ 50.36, 50.36a -- the statutory and regulatory provisions detailing the contents of a plant's technical specifications.

Here, the Petitioners' contention does not even mention AEA section 182a or regulatory sections 50.36 or 50.36a, much less state why those provisions require that the procedural details and associated bases of the Millstone RETS need to remain in the Millstone operating licenses. Without this essential information, the Petitioners' contention does not contain "[s]ufficient information . . . to show that a genuine dispute exists with the applicant on a material issue of law or fact" as required by 10 C.F.R. § 2.714(b)(2)(iii). See Oconee, CLI-99-11, 49 NRC at 337, 341. Accordingly, the contention must be rejected.

The dissent (at 45-52) appears to argue, apparently relying upon the Commission's decision in Perry, CLI-96-13, 44 NRC at 327-29, that a contention challenging the removal of a technical specification from an operating license need not show that the provisions of AEA section 182a or 10 C.F.R. §§ 50.36, 50.36a require the technical specification to remain as a specified term of the operating license. Rather, the dissent claims that Perry somehow enlarged the realm of admissible contentions to include those in which the removal of a technical specification would give the licensee greater operational authority, apparently regardless of whether the technical specification was required by AEA section 182a or 10.C.F.R. §§ 50.36 and 50.36a to be in the technical specifications in the first place or the relationship of the technical specification to reactor safety. Thus, it appears that the dissent reads Perry to set out a "once there, forever there" rule for technical specifications when removal of the technical specification would somehow increase the licensee's operational authority, even though there is no connection to reactor safety or any statutory or regulatory

requirement that the technical specification be included in the operating license. We do not read the Commission's decision in Perry to dictate such a result.

The Petitioners' contention must also be rejected for several additional reasons. During the telephone prehearing conference held long after the deadline for Petitioners' final contentions, the Petitioners apparently recognized the necessity of alleging in their contention that the Commission's regulations require that the Millstone RETS remain as specific terms of the operating licenses. At the conference, the Petitioners claimed for the first time that 10 C.F.R. § 50.36(c)(1)(ii)(A) requires that the material at issue remain in the technical specifications. (Tr. 26-28). In response to a direct question whether their contention stated that section 50.36(c)(1)(ii)(A) required the technical specifications at issue to remain in the license, the Petitioners' counsel answered that "[w]e haven't explicitly set that forth. I believe it is implicit in our petition." (Tr. 56).

Contrary to the Petitioners' assertion, however, this fundamental, indispensable element of a challenge to the removal of material from a plant's technical specifications is not implicit in their contention. The contention does not even mention the word "regulation" much less refer to 10 C.F.R. § 50.36(c)(1)(ii)(A) and nothing in the language or structure of the contention even vaguely suggests that the Commission's technical specification regulations require that the Millstone RETS remain part of the operating license. Nor is the failure to include such an indispensable element of a challenge to the removal of material from a plant's technical specifications the kind of minor pleading error that can be added to a contention long after the time for filing contentions has past. Similarly, it cannot reasonably be asserted that rejecting the Petitioners' contention for failing to comply with the contention pleading requirements of the Commission's regulations is somehow holding the Petitioners to a standard of technical perfection in the pleading of contentions.

Moreover, even if we ignore the lateness of the Petitioners' attempt to remedy the omission of indispensable information from their contention, the regulatory provision relied upon by the Petitioner (Tr. 26-28) at the prehearing conference as requiring the retention of the Millstone RETS in the operating licenses -- 10 C.F.R. § 50.36(c)(1)(ii)(A) -- is by its terms, inapplicable to NNECO's license amendment application. Rather, only 10 C.F.R. § 50.36(c)(2)(ii) is applicable to a determination of whether the procedural details of the Millstone RETS need to remain in the facility technical specifications. Therefore, for these additional reasons, the Petitioners' contention fails to comply with 10 C.F.R. § 2.714(b)(2)(iii) and must be rejected.

The failure of the Petitioners' contention to comply with yet another requirement of section 2.714(b)(2)(iii) also requires that we reject the contention. That regulatory provision provides that the Petitioners' contention "must include references to the specific portions of the application . . . that the petitioner disputes and the supporting reasons for each dispute." 10 C.F.R. § 2.714(b)(2)(iii). But the Petitioners' contention is completely devoid of any references to specific portions of the Licensee's amendment application. Similarly, the contention does not dispute any of the Licensee's analysis or conclusions set out in the license amendment application regarding why the applicable provisions of the Commission's technical specification regulation, 10 C.F.R. § 50.36(c)(2)(ii), do not prohibit the relocation of the various technical specifications at issue to the Millstone REMODCMs. The fact that the Licensee's amendment application is long and deals with numerous interrelated technical specifications does not somehow exempt the Petitioners from complying with the requirements of section 2.714(b)(2)(iii) to identify each portion of the amendment application that they dispute along with the reasons for each of their objections. Nor is there anything unique about a contention challenging the removal of material from a plant's technical specifications that somehow makes the contention pleading requirements of section 2.714(b)(2)(iii), or any of the

other contention pleading rules, inapplicable. One of the purposes of the Commission's contention pleading rules is to "focus[] the hearing process on real disputes susceptible of resolution in an adjudication." Oconee, CLI-99-11, 49 NRC at 334. In line with this purpose, the requirements of section 2.714(b)(2)(iii) are intended to force petitioners who wish to invoke the agency's hearing process to identify and support, at the outset of the proceeding, each and every genuine dispute of material law or fact that they wish to contest regarding a licensee's amendment application. As the Commission stated regarding these specific contention pleading requirements, "[a] contention alleging that an application is deficient must identify 'each failure and the supporting reasons for the petitioners' belief' " and "[i]t is [the petitioners'] job to review the application and to identify *what* deficiencies exist and to explain *why* the deficiencies raise material safety concerns." Id. at 336-337. Thus, "a contention 'that fails directly to controvert the license application . . . is subject to dismissal.' " Id. at 342 (quoting Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181 (1998). Here, the failure of the Petitioners' contention to identify each and every portion of the Licensee's amendment application that they dispute, along with their reasons for each of their objections, requires that we reject the contention.

As already amply demonstrated, the Petitioners' contention fails to state and support a litigable issue regarding their alleged loss of hearing rights. The assertions in the remainder of the Petitioners' contention, to the extent they are relevant at all to loss of hearing rights issue they seek to raise on the Licensee's amendment application, do nothing to enhance the admissibility of their contention. The Petitioners assert that the license amendment will lower standards of radiological effluent monitoring and increase the types and amounts of effluents released offsite thereby causing increased radiation doses to the public and increasing the risk of cancer, immunodeficiency diseases, and other adverse health effects.

First, the Petitioners claim that the license amendment will lower standards of effluent monitoring is nothing more than the Petitioners' own ipse dixit. The contention references no documents or other sources to support their claim as required by section 2.714(b)(2)(ii). As the Commission stated in analogous circumstances, "[d]ocuments, expert opinion, or at least a fact-based argument are necessary." Id. at 342. Hence, this assertion fails to comply with the bases requirements of the Commission's Rules of Practice.

Second, the claim in the contention that the license amendment will increase the types and amounts of effluents released offsite also lacks adequate support. Although the contention refers to the Licensee's cover letter on the amendment application to support their claim, an examination of the letter shows that the letter neither states nor implies that the amendment request includes any increases in releases of radiological effluents offsite. Similarly, the Petitioners have not pointed to any other portion of the amendment application proposing any increase in offsite releases or otherwise provided a reasoned explanation of how such increases will occur. Accordingly, this unsupported assertion also fails to comply with the requirements of section 2.714(b)(2)(i) and (ii).

Finally, the Petitioners claim that the amendment will cause an increased risk to the public of cancer and other adverse health effects. In support of this assertion, the Petitioners' contention incorporates the affidavit of Joseph Mangano. Because the Petitioners' claims upon which Mr. Mangano's allegations rest (i.e., the amendment will lower standards of radiological effluent monitoring and increase offsite effluent releases) are not properly supported, his affidavit claiming deleterious health effects is irrelevant. Nor does Mr. Mangano's affidavit independently show that the license amendments at issue will increase radiological effluent releases. Even assuming relevancy, however, Mr. Mangano's affidavit does not raise or properly support any matters within the scope of this license amendment proceeding.

The Petitioners' contention explicitly states that "the public will be exposed to greater risk of radiation doses from the routine operations of the Millstone nuclear reactors if NNECO obtains the amendment requested." Amended Petition at 4 (emphasis supplied). Further, the contention states that "[t]he Petitioners are prepared to establish through expert testimony that any increase in routine radiological effluent to the air and water by the Millstone nuclear reactors will expose the public to greater risk of cancer, immunodeficiency diseases and other adverse health effects." Id. (emphasis supplied). By definition, "routine radiological effluent[s]" from "routine operations" are those from normal operations, not abnormal operations or accident conditions. Necessarily, therefore, routine effluent releases from routine operations are releases within regulatory limits. Mr. Mangano's affidavit does not make clear whether the increased effluent releases he alleges (and which he claims will cause adverse health effects) will be within regulatory limits or violate the Commission's regulations.[8] If the former, Mr. Mangano's assertion represents an impermissible challenge to the Commission's regulations, 10 C.F.R. Part 20 and Part 50, that establish radiological dose limits. See 10 C.F.R. § 2.758.

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[8]The dissent ignores the explicit language of the Petitioners' proffered contention alleging "routine radiological effluent[s]" from "routine operations," Amended Petition at 4, and instead effectively amends the contention to allege effluent releases that exceed regulatory limits in making her argument. See Dissent at 41 & n.16. As the Commission has frequently emphasized, however, "the burden of coming forward with admissible contentions is on their proponent . . . not the licensing board." Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC at 22; see Florida Power & Light Company (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000). The Licensing Board may not properly supply missing information to a proffered contention to make it admissible. Indeed, the dissent's "Overview of Information in Record Relating to Alleged Increased Risk of Hazard," Dissent at 20-31, is little more than an attempt to add explanations and supporting details to the Petitioners' proffered contention that the contention, as filed, nowhere contains. In this regard, the dissenting Board Chairman treats a routine telephone oral argument on the Petitioners' standing and the admissibility of their one contention as some sort of evidentiary hearing from which the dissent, in effect, makes factual findings. At that time, however, the Board Chairman accurately articulated the dissent's underlying position that "[a]s a relative newcomer here, on the one hand it seems to me that when you are talking about the release of radiological effluent, it is almost implicitly safety significant, and that the monitoring of that would also thereby be implicitly safety significant." (Tr. 48-49).

On the other hand, if Mr. Mangano is asserting that, pursuant to the amendment, the licensee in the future will violate the Commission's regulatory dose limits, then his claim directly contradicts the Petitoners' contention. In any event, such a claim is insufficiently supported. Although Mr. Mangano's affidavit states that in 1999 the Licensee pled guilty in federal court to felonies under the Atomic Energy Act and the Clean Water Act, he provides no further explanation or documentation for that statement and no other supported claims that would establish a pattern and practice of past conduct by the Licensee sufficient to warrant a conclusion that the Licensee will violate the Commission's regulations in the future if this license amendment is granted. Absent such support, we will not presume a Licensee will violate the regulations. See GPU Nuclear, Inc., (Oyster Creek Nuclear Generating Station) CLI-00-6, 51 NRC 193, 207 (2000); Private Fuel Storage, LBP-00-35, 52 NRC __, __, slip op. at 57 (Dec. 29, 2000); General Public Utilities Nuclear Corporation (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 164 (1996). Accordingly, Mr. Mangano's affidavit does nothing to remedy the inadmissibility of the Petitioners' contention.

III. Conclusion

For the foregoing reasons, we find that the Petitioners' sole proffered contention is inadmissible. Accordingly, pursuant to 10 C.F.R. § 2.714(b)(1), the Petitioners may not be admitted as parties to the proceeding and their intervention petition must be denied and the proceeding terminated.

As provided in 10 C.F.R. § 2.714a, the Petitioners, within ten (10) days of service of this Memorandum and Order, may appeal the Order to the Commission by filing a notice of appeal and accompanying brief.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD
/RA/

_____
Thomas S. Moore
ADMINISTRATIVE JUDGE
/RA/

_____
Dr. Charles N. Kelber
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 29, 2001

Dissent of Judge Young

I respectfully dissent. I agree with my colleagues that the Petitioners' contention lacks precision in some particulars, which I find makes the case a close one. The Petitioners' assertion that relocating the technical specifications at issue to the REMODCM will result in future changes to the Millstone radiological liquid and gaseous effluent monitoring instrumentation, which will in turn result in lowered standards and "increases in the type and amounts of effluents that may be released offsite," Connecticut Coalition Against Millstone and Star Foundation Amended Petition for Leave to Intervene and Request for Hearing (Oct. 27, 2000), at 4 [hereinafter Amended Petition], is accompanied by neither any citation to specific portions of the amendment application, nor any specific statutory or regulatory authority, nor any specific estimate as to the precise amounts of potential increases in effluents, nor any specific and precise description of how such increases might occur. These factors taken alone

might lead me also, at first blush, to find that the provisions of 10 C.F.R. § 2.714(b)(2) have not been completely satisfied.

I find, however, that a fuller view of this case is in order under applicable law and, based upon the following overview and analysis, conclude that the Petitioners have established not only standing but also the admissibility of their contention sufficiently to warrant further inquiry in the case.

Overview of Information in Record Relating to Alleged Increased Risk of Hazard

Before addressing the law governing the issues of standing and the admissibility of the Petitioners' contention in this proceeding, an overview of the information in the record relating to the nature, significance, and actual effect of relocating the technical specifications at issue, particularly with regard to the possibility of future changes that could result in increased releases of radiological effluents, is helpful in providing context for the legal analysis.[9]

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[9]I undertake this overview not in any attempt to add anything to the petitioners' contention to make it admissible (*see* Majority Memorandum *supra*, at n.8), or to make any findings of fact on the merits of this case, but rather to discuss the results of my examination of the information in the record as I have attempted to clarify relevant factual issues and determine whether any potential injury asserted by the petitioners rises to a level sufficient to establish standing, as well as whether the petitioners' contention sufficiently raises litigable issues or would, even if proven, "be of no consequence because it would not entitle [the] petitioner[s] to relief." *See* 10 C.F.R. § 2.714(d)(2)(ii). This discussion includes a recounting of portions of the prehearing conference during which my colleagues and I heard oral argument and questioned all participants on a number of issues relating, as indicated in the text, to the nature, significance and effect of relocating the technical specifications at issue. The appropriate extent of such attempts to clarify matters relevant to standing and the admissibility of contentions, and to conduct a "thoughtful, albeit non-merits review" of petitioners' information and theories is not a static or easily defined matter. *See, e.g.*, *Vermont Yankee Nuclear Power Corporation* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), *vacated in part and remanded*, CLI-90-4, 31 NRC 333 (1990); *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), LBP-90-25, 32 NRC 21, 24-28 (1990) [hereinafter *Perry A*]. And it is not unusual, in close cases such as this one, that differing conclusions can be reached by different minds, each endeavoring in good faith to analyze matters presented in light of applicable law, and still ending up in honest disagreement. This is the standard I have adhered to in this case, as I believe a fair reading of the record will establish.

In their Amended Petition, the Petitioners assert that the amendment at issue will lead to their members "suffer[ing] increased risk of hazard from radiological releases . . . and consequent adverse health effects." Amended Petition at 2. They allege that relocating the technical specifications at issue will deprive them of notice and opportunity for hearing with regard to proposed changes, "which can only be projected to lower standards of radiological effluent monitoring in the era of deregulation" and "opens the door to increases in the type and amounts of effluents that may be released offsite," which will lead to "greater risk of radiation doses from the routine operations of the Millstone nuclear reactors." *Id.* at 2-4. The Petitioners offer the "Declaration" and are prepared to offer the expert testimony of Joseph Mangano, who has a MPH in Health Administration and an MBA in Management and who has written on health effects of radiation, to establish that "any increase in routine radiological effluent to the air and water by the Millstone nuclear reactors will expose the public to greater risk of cancer, immunodeficiency diseases and other adverse health effects." *See id.* at 4; *see also* Amended Petition at 5, Decl. of Joseph Mangano. My colleagues have quoted the complete contention of the Petitioners above, except for the Declaration of Mr. Mangano, which is incorporated as part of the contention and contains a series of facts and allegations that are discussed in more detail in the section below on the Admissibility of the Petitioners' Contention.

The Staff and the Applicant contend that there is no increased risk of hazard such as the Petitioners have alleged that could result from relocating the technical specifications at issue so as to support a finding of either standing or an admissible contention in this proceeding. *See* NRC Staff's Response to Petition for Leave to Intervene and Request for Hearing Filed by [CCAM and STAR] (Sept. 28, 2000) at 10 [hereinafter Staff Response to Petition]; NRC Staff's Response to Amended Petition to Intervene and Request for Hearing filed by [CCAM and STAR] (Nov. 17, 2000) at 5 [hereinafter Staff Response to Amended Petition]; Northeast Nuclear Energy Company's Answer to Request for a Hearing and Petition for Leave

to Intervene (Sept 25, 2000) at 11 [hereinafter NNECO Answer to Petition]; Northeast Nuclear Energy Company's Answer to Amended Petition to Intervene (Nov. 17, 2000), at 7, 12 [hereinafter NNECO Answer to Amended Petition]. NNECO characterizes its license amendment request as follows:

> [The request] concerns no more than relocating -- intact -- selected Radiological Effluent Technical Specifications ("RETS"), and the associated Bases, to the Millstone Radiological Effluent Monitoring and Offsite Dose Calculation Manual ("REMODCM"). The proposed relocation is consistent with the requirements of 10 C.F.R. § 50.36[c](2)(ii), which describes the limiting conditions for operation for which Technical Specifications must be established. Also, consistent with 10 C.F.R. § 50.36a(a), the proposed changes include a new programmatic Technical Specification addressing the radioactive effluent monitoring program, mandating the related operating procedures and specifying procedures for future changes. Finally, the proposed relocation is consistent with the Commission's "Final Policy Statement on Technical Specification Improvements for Nuclear Power Reactors" [citing 58 Fed. Reg 39,132, 39,136 (July 22, 1993), as amended, 60 Fed. Reg. 36,953 (July 19,1995)], with Generic Letter 89-01, and with NUREG-1431 and NUREG-1432. The LAR does not involve any change to radiological monitoring instrumentation or radiological effluents from the nuclear units, nor does it impact the assumptions used in any accident analysis, affect plant equipment, plant configuration, or the way in which the plant is operated.

NNECO Answer to Amended Petition at 2-3.[10]

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[10]The "new programmatic Technical Specification addressing the radioactive effluent monitoring program, mandating the related operating procedures and specifying procedures for future changes," appears to be that found in new Technical Specification 6.15 for Unit 2 of the plant, and new Technical Specification 6.13 for Unit 3. According to the Staff's issuance of the license amendments at issue, the provisions appear to be essentially identical, and read as follows:

> RADIOLOGICAL EFFLUENT MONITORING AND OFFSITE DOSE CALCULATION MANUAL (REMODCM)
>
> a. The REMODCM shall contain the methodology and parameters used in the calculation of offsite doses resulting from radioactive gaseous and liquid effluents, in the calculation of gaseous and liquid effluent monitoring alarm and trip setpoints, and in the conduct of the radiological environmental monitoring program; and
>
> b. The REMODCM shall also contain the radioactive effluent controls and radiological environmental monitoring activities and descriptions of the information that should be included in the

(continued...)

[10](...continued)

> Annual Radiological Environmental Operating, and Radioactive Effluent Release, reports required by Specification [6.9.1.6a or 6.9.1.3] and Specification [6.9.1.6b or 6.9.1.4] [having to do with an "Annual Radiological Environmental Operating Report" and a "Radioactive Effluent Release Report," also an annual report that is to include "a summary of the quantities of radioactive liquid and gaseous effluents and solid waste released from the unit," *see* License Amendments at 6-18 (Unit 2), 6-19 (Unit 3)].

Licensee initiated changes to the REMODCM:

a. Shall be documented and records of reviews performed shall be retained. This documentation shall contain:

   1) sufficient information to support the change(s) together with the appropriate analyses or evaluations justifying the change(s), and

   2) a determination that the change(s) will maintain the level of radioactive effluent control required by 10 CFR 20.1302, 40 CFR Part 190, 10 CFR 50.36a, and Appendix I of 10 CFR 50, and not adversely impact the accuracy or reliability of effluent, dose, or setpoint calculations;

b. Shall become effective after review and acceptance by SORC and the approval of the designated officer; and

c. Shall be submitted to the Commission in the form of a complete, legible copy of the entire REMODCM as a part of or concurrent with the Radioactive Effluent Release Report for the period of the report in which any change in the REMODCM was made. Each change shall be identified by markings in the margin of the affected pages, clearly indicating the area of the page that was changed, and shall indicate the date (i.e., month and year) the change was implemented.

Memorandum to Atomic Safety and Licensing Board and All Parties from Jacob I. Zimmerman, Attached Amendment Nos. 250 and 188 for Millstone Units 2 and 3, respectively, at 6-24 of each amendment (Nov. 28, 2000). It is noted that the language of the new technical specifications is taken almost verbatim from Enclosure 3 to Generic Letter 89-01. It is also noted that the Staff, in the Safety Evaluation for Amendment Nos. 250 and 188, states that "[Generic Letter 89-01] states that because programmatic controls on radiological effluents will remain in the TSs and the procedural details being relocated to the [REM]ODCM . . . do not meet any of the four criteria given above [referring the criteria found at 10 C.F.R. § 50.36(c)(2)(ii)(A)-(D)] for inclusion in the TSs, the staff considers that the requirements in 10 CFR 50.36a for TS on radiological effluents from nuclear power plants will continue to be met." *See* Attach. to Nov. 28, 2000, Zimmerman Memorandum, at 3 [hereinafter Safety Evaluation]. It is not known whether there have been any supplements to Generic Letter 89-01, issued in

(continued...)

During a telephone prehearing conference held December 7, 2000, the Board heard oral argument on the issues of standing and the admissibility of the contention in this case, and NRC and NNECO experts were also heard, over the objection of the Petitioners' Counsel, in an effort to clarify the issues in the case, *see* 10 C.F.R. § 2.752(a)(1). Mr. Joseph H. Besade, a member of CCAM who had previously worked at the Millstone plant and whose affidavit was attached to the Amended Petition, *see* Amended Petition at 13, Aff. of Joseph H. Besade (Oct. 26, 2000), also spoke briefly. This attempt at clarification was particularly appropriate, given what was somewhat obviously at that point a "genuine dispute" between the parties on the "material issue" of whether in fact the relocation of the technical specifications at issue would, as Petitioners claim, "open the door to increases in the type and amounts of effluents that may be released offsite [which will lead to] greater risk of radiation doses from the routine operations of the Millstone nuclear reactors," Amended Petition at 4, or would instead, as the Applicant declares, "not involve any change to plant operation, radiation monitoring, or radiological effluent releases," nor, if future changes did occur, "cause [any] accidental releases." NNECO Answer to Petition at 12; NNECO Answer to Amended Petition at 3, 8, 12-13.

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[10](...continued)
1989, addressing the four criteria of 10 C.F.R. § 50.36(c)(2)(ii)(A)-(D) that were promulgated in 1995, 60 Fed. Reg. 36,953-36,959, after having originally been proposed in two earlier versions in 1982 and 1987, and proposed in their final version in 1993 with the Commission's Final Policy Statement on Technical Specification Improvements for Nuclear Power Reactors. *See* 58 Fed. Reg. at 39,132. (The 1982 version had only two criteria, 47 Fed. Reg. 13,369 (Mar. 30, 1982), while there were three criteria in the 1987 version, 52 Fed. Reg. 3788 (Feb. 6, 1987).) Generic letter 89-01, however, does not itself refer to the final four section 50.36(c)(2)(ii) criteria.

In response to the Petitioners' argument that the "procedural step of moving . . . technical specifications [is] related to serious health and safety issues," Tr. 21, and "concern[s] automatic protective devices [that are] barriers to prevent accidental release of radiological effluent," Tr. 27, Staff Counsel and the Staff's expert, health physicist Stephen Klementowicz, stated that the radiological effluent monitoring involved in the technical specifications at issue in this proceeding involve only "normal releases . . . very, very small amounts," "routine, low level effluent release monitoring," and that "[t]hese monitors only serve a monitoring function[, s]o if there was a reactor accident, these monitors don't do that . . . [t]hey do not prevent the severity of [a] reactor accident, nor do they mitigate the consequences and severity of [an] accident." *See* Tr. 90, 97-98. Other statements, however, made by or on behalf of both the Staff and the Applicant to counter the allegations of the Petitioners, were not so unequivocal, as illustrated in the following discussion.

The Applicant's Counsel acknowledged that "a surveillance requirement [relating to a monitoring instrument] might conceivably be changed down the road," which, if something else failed and surveillance were somehow to become unduly lax, "because of the reduced surveillance, fails to pick up [a] release." Tr. 41-42. Although this was said to be very unlikely and to "really stretch[ ] credibility . . . given the nature of the instrumentation involved, . . . the existence of the effluent limit that will not change, [and] the control process that will exist on future changes," it was also acknowledged that an increased release of radiological effluent "that could lead to an immediate danger to public health or safety," as a result of such a failure to catch a release, could not be categorically discounted -- "somebody might argue that that could occur." Tr. 43-44.[11] An example given of a possible future change to the radiological

[11]It is noted that Mr. Repka, who made the statement to the effect that such a possibility could not be categorically discounted, later clarified his response after Ms. Hodgdon, Counsel for the NRC Staff, noted that "[o]perating experience has shown to the contrary, that it doesn't

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effluent monitoring was changing the surveillance interval for a monitor, or for checking a monitor. *See id.* at 77. There have also been references to such possibilities constituting unreviewed or unresolved safety questions, *see id.* at 39-40, 94, and that a change that would involve such a question would require NRC Staff approval. *See id.* at 40.

The Staff's view as expressed at the December 7, 2000, prehearing conference was to the effect that the "bottom line" is that there could never be any changes as a result of the relocation of the technical specifications at issue in this proceeding that could ever result in any safety-significant event. In reaching this point, NRC health physicist Stephen Klementowicz began by explaining the purpose of Generic Letter 89-01:

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[11](...continued)
need to be in tech specs," and stated, "I believe that the better answer might have been that if it will be possible after these tech specs are moved to the licensing control document, that it would have been possible before these tech specs were moved. It has nothing to do with this action." Tr. 92. Mr. Repka stated that he agreed with Ms. Hodgdon's response, that it was "exactly correct." *Id.* This was followed up by an attempt to clarify which sorts of things could be changed without a license amendment prior to any relocation of the technical specifications at issue herein, and which would require a license amendment, to which Ms. Hodgdon responded as follows:

> Whatever is in the tech specs specifically, those details cannot be changed or could not be changed prior to this license amendment without a license amendment. However, just to stray a little bit from that, these Petitioners -- the public would not have a right to intervene. They would have a right to notice. But since this has no off-site consequences, no hearing would be granted on these amendments dealing with small changes to the kind of details that should never have been in tech specs in the first place, as the Commission makes clear in the statement of considerations on 50.36. *Id.* at 93-94.

What is problematic in Counsel's statements is that they are conclusory in nature, like much of the discussion in this proceeding about the nature of the subject of the technical specifications at issue, with certain exceptions. As a result it is not clear what the basis is for the conclusion in effect drawn by the Applicant and the Staff, that there could *never* be any significant likelihood that changes in the monitoring instrumentation and surveillance requirements governed by the technical specifications at issue herein, of the sort that would require a license amendment prior to relocation of the relevant technical specifications but would not require an amendment after such relocation, could result in a failure to detect a higher-than-routine release as quickly as before, such that there could be a violation of a regulatory dose limit and harm to public health and safety. The fact that the monitoring instrumentation at issue is designed to monitor only low, routine levels of radiological effluents does not appear to lead inexorably to this conclusion.

> [I]ts purpose was not to change the dose criteria for effluents. It remains to be Appendix I to Part 50. . . . [but] it was not appropriate to have all of these details of the monitors and the surveillances and the calibrations in the tech specs. So the Commission said you can take out that level of detail. However, we maintained the overall dose controls, consistent with Appendix I to Part 50.

Id. at 96.

When asked what things could be changed in the future under the manual, Mr. Klementowicz responded that some setpoint levels (which generally include an "absolute high alarm point . . . consistent with 10 C.F.R. Part 20 [as well as] a lower setpoint that corresponds to the ALARA Appendix I to Part 50 value" and "a third setpoint for each . . . batch release that occurs") could be changed, and also in effect agreed with Applicant Counsel's statement above that a surveillance frequency, or how often an operator would check monitor readouts, could be changed. *Id.* at 102-103. In addition, he posed the possibility of a licensee deciding that they will "no longer monitor their units at release points" and making "that change in their [REM]ODCM through their own review process." *Id.* at 106. Mr. Klementowicz pointed out that if this were done and the NRC discovered through inspection that the licensee "is still making effluent releases via that pathway, but deleted it from their [REM]ODCM, we would say that is a violation of regulations." *Id.*

Notwithstanding the previous statements, Mr. Klementowicz still did not think that there could be any increases in effluent releases as a result of any such changes, because licensees are still required to conform with the regulatory dose limits, and "assuming a licensee conforms with their tech spec for the total dose, their setpoints could never exceed that value." *Id.* at 104. Licensees can change setpoints that do not exceed the absolute high setpoint even with the technical specifications remaining in the license, according to Mr. Klementowicz, and there can be human error whether the requirements at issue are in the license technical specifications or in the manual. Therefore he did not believe that changes under the manual could lead to a greater likelihood of increased releases that could threaten public health and safety. If the

licensee made an inappropriate change, according to Mr. Klementowicz, the NRC could issue a notice of violation and require the licensee to correct the situation. *See id.* at 104-108.

Mr. Klementowicz stated that after the Three Mile Island accident the NRC ordered, in NUREG-0737, all licensees to install high-range monitors that monitor high amounts of radiation released from the plant. *Id.* at 98. This was necessary, according to Mr. Klementowitz, because "the low level routine monitors that were across the board in the industry were found to not be adequate to monitor high range releases[, so, pursuant to NUREG-0737,] there are two separate and distinct classifications of radiation monitors." *Id.* at 109.[12] Low radiation level monitors such as are involved with the technical specifications at issue will not register high levels of radiation, for reasons which are subject to many theories, according to Mr. Klementowicz. Therefore, plants were required to install monitors so that plants would "be able to follow an accident from a low range fully to high range." *Id.* at 110. Mr. Klementowicz said that, "if there is a reactor accident," the monitors that are addressed in the technical specifications at issue "will not change the course of events." *Id.* at 97. He agreed, however, that "if [a] monitor alarms, . . . it alerts somebody that something unusual is happening, and that operator can take action to terminate the release." *Id.* at 99. And he later stated that there are some trip functions in the low-level liquid release monitors that will terminate a release if it exceeds the high setpoint. *Id.* at 113. Petitioners' Counsel also referred at the prehearing conference to a statement in the application (February 22, 2000, Request, Attachment 2, at 1) about trip functions "terminat[ing a] release prior to exceeding the limits of 10 CFR Part 20." Tr. 21.

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[12]It is noted that the Transcript at page 109 mistakenly identifies the speaker of the quoted language, by attributing two successive statements to Judge Young, and omitting to indicate when Mr. Klementowicz actually began to speak during the first statement attributed to Judge Young. However, it is obvious from the words used that they were those of Mr. Klementowicz and not Judge Young.

Because of time limitations on the December 7 telephone prehearing conference, some apparent inconsistencies, as illustrated in the previous paragraphs, were not completely explained or resolved, and one result of the decision of my colleagues is that these and other inconsistencies will not be clarified. For example, the statement in the Applicant's February 22, 2000, Request that "approval of this amendment is needed by [August 31, 2000] to support the ongoing effort to eliminate Millstone Unit Nos. 2 and 3 dependence on the Millstone Unit No. 1 Stack Gas High Range Radiation Monitor," highlighted by the Petitioners' Counsel at the December prehearing conference, *see* Tr. 127-128, would seem on its face to contradict Mr. Klementowicz's statement to the effect that high and low range monitors are "two separate and distinct classifications of radiation monitors." *Id.* at 109.

Notwithstanding such inconsistencies, however, it is noted that the Applicant's Counsel, with admirable candor, addressed what would appear to be at least one aspect of the nature of the monitors that are the subject of the technical specifications at issue in this proceeding when he stated, in response to a question concerning the nature of the relocated technical specifications and whether the monitoring they cover would catch an accidental or unusually high release, that "yes, these are radiation monitors so they would detect accidental normal or abnormal releases."[13] *Id.* at 86. From this, it would seem to follow that, to consider but one

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[13]In the interest of accuracy and context, the following excerpt from the transcript of the December 7, 2000, prehearing conference, from pages 85-86, is provided:

JUDGE YOUNG: That's what I'm trying to understand. If we have a technical expert, what I would like to hear from him is if the nature of the technical specifications that are being moved are such that they could allow for changes in the monitoring methodology that -- such that they could fail to catch a release, such that they could fail to catch a release that could lead to immediate public health and safety consequences.

MR. JOSHI: The answer to the question, actually if we make a change, is what Dave was saying before, will still -- if we will make a change, we got to make sure that we are still within the regulation with the limits. So we cannot go beyond the limit.

JUDGE YOUNG: Right. But what I'm trying to understand is, are the things that you could make changes to the sort of monitoring and surveillance mechanisms and methodologies that are there to catch releases that might result from an accident?

(continued...)

example of the type of change discussed above, changing surveillance schedules to allow for less frequent monitoring could possibly result in a failure to detect and address an accidental abnormal release of radiological effluent as quickly or effectively as on an unchanged, more frequent schedule.

The Petitioners have questioned whether the position of the NRC Staff is to the effect that routine radiological monitoring has no safety significance and that only design basis accidents or catastrophic incidents are deemed to have safety significance such that a hearing should be granted in a case involving relocation of technical specifications. Tr. 129-130. And indeed, in comparison to the reactor vessel material surveillance program withdrawal schedule at issue in *Perry I*, this case does involve a lower level of safety significance. NNECO's

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[13](...continued)

I'm hearing Judge Moore say no. Is the answer no? Is that what you're saying? That they are not of that nature?

MR. REPKA: That they would not address accidental releases?

JUDGE YOUNG: They are not of the sort that monitor -- that provide monitoring that would catch an accidental or unusually high release?

JUDGE MOORE: I believe, Mr. Repka, I asked that question and you answered it that these systems involved with these tech specs do not do that.

JUDGE YOUNG: I thought -- and I thought I heard you say, Mr. Repka, that it would be possible that they could do that. So that's what I am trying to understand.

MR. REPKA: Well, I mean I think the answer has to be that, yes, these are radiation monitors so they would detect accidental normal or abnormal releases.

JUDGE KELBER: Let me try and straighten this out. Are we talking about redundant systems? In other words, are we talking about a system that monitors the equipment in the off-gas -- let's focus on the off-gases -- that monitors the operation of the off-gas system, those technical specifications covering those systems are not of the current amendment, and also the radiation monitor which, of course, will detect an abnormal release. It seems to me we are talking about redundant systems.

MR. REPKA: I believe that is correct, Judge Kelber.

JUDGE KELBER: Well, then, the technical specifications covering one set of the redundant systems, I am not finding them in technical specifications called for in other parts of the redundant system are part of the technical amendment. Like the Perry license amendment.

MR. REPKA: Correct.

JUDGE KELBER: Thank you.

JUDGE YOUNG: While we are with Mr. Joshi, or Dr. Joshi, can you explain anything more about the monitoring methodologies, systems, that are part of the redundancy that Judge Kelber referred to, more specifically?

MR. JOSHI: No, I don't have a specific answer at this point right now. I need to go back.

Counsel referred to the radiological monitoring at issue as a "second tier component." *Id.* at 41. The relevant area that appears to be in question in this proceeding is that area in which effluents that are not in the high range of possible effluent releases might still increase to the point that they would exceed the limits of Appendix I to 10 C.F.R. Part 50, resulting not from the sort of major accident that would produce high-range releases but rather from some other cause, such as a relatively minor accidental or other failure of equipment, accompanied by a failure to detect and correct as quickly the increased release, by virtue of changed surveillance schedules or setpoints (or placement of monitors at inappropriate release points) as well as failure of whatever redundant systems exist to detect and/or stop such "moderately excessive" releases. In this context, I turn now to the issue of standing.

Standing

I note first the principle that even "minor radiological exposure" can constitute adequate grounds for finding standing. *See North Atlantic Energy Service Corporation* (Seabrook Station, Unit 1), LBP-98-23, 48 NRC 157, 162 (1998), *vacated as moot*, CLI-98-24, 48 NRC 267 (1998); *Atlas Corporation* (Moab, Utah Facility), LBP-97-9, 45 NRC 414, 425 (1997), *aff'd*, CLI-97-8, 46 NRC 21 (1997); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 70 (1996), *aff'd*, CLI-96-7, 43 NRC 235, 246-248 (1996); *General Public Utilities Nuclear Corporation* (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 158-159 (1996). The Petitioners have provided the affidavit of Joseph Besade, a member of CCAM, who lives approximately two miles from the Millstone Nuclear Power Station. *See* Amended Petition at 13.[14] In their Amended Petition the Petitioners assert that, "[s]hould the amendment

[14]Another affidavit, that of STAR member Christine Guglielmo, was submitted late, on November 8, 2000. NNECO and the Staff argue that Ms. Guglielmo's affidavit should be rejected as untimely. On this issue, were this case to encompass further proceedings before this Board, I would be inclined to rule as argued by NNECO and the Staff. No good cause has been shown for the late filing of the affidavit, other than the statement that the cause of the

(continued...)

be granted, the membership of CCAM and STAR Foundation will suffer increased risk of hazard from radiological releases from Millstone Units 2 and 3 and consequent adverse health effects with no opportunity for comment or objection." Amended Petition at 2.

In light of these assertions of the Petitioners, and the admissions of the Staff's expert and the Applicant's Counsel to the effect that it is possible that changes in provisions such as surveillance schedules could lead to possible delayed detection and correction of increased effluent releases, I find that there is the possibility in this case of at least "minor radiological exposure" that could result from future such changes to the REMODCM after relocation of the technical specifications at issue to it from the license.

Moreover, Mr. Besade and the Petitioners allege that, as a result of relocating the technical specifications, "modifications to the instrumentation and surveillance mechanisms to monitor routine radioactive releases from Millstone Units 2 and 3 may thereby be effected without public notice and the opportunity for hearing." Amended Petition at 2, 14. By raising their potential loss of future hearing rights, the Petitioners have overcome a significant initial hurdle with regard to their standing, given the "special" nature of such procedural rights. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992); *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 94 (1993) [hereinafter *Perry I*]. And if the procedural rights at issue in this proceeding are "designed to protect some threatened concrete interest . . . that is the ultimate basis of [the Petitioners'] standing," then the Petitioners have met the test for standing in such circumstances, as enunciated in *Lujan, see*

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[14](...continued)
lateness was a "communications error," with no further explanation. Although the 10 C.F.R. § 2.714(a) lateness factors, relied upon by NNECO counsel, may not be directly applicable to supplements to petitions, looking to them for guidance would lead to conclusions that Mr. Besade's participation in the proceeding, along with Counsel for both Petitioners, would likely sufficiently protect and represent Ms. Guglielmo's interest, and that it is unlikely that her participation would assist measurably in developing a sound record.

504 U.S. at 573 n. 8, and applied by the Commission in *Perry I*. *See Perry I*, CLI-93-21, 38 NRC at 94-96. I find that the possible exposure alleged by the Petitioners and illustrated in the above Overview constitutes such a "threatened concrete" injury.

In *Perry I* the Commission reversed the Licensing Board's decision denying standing, in a context much like that in this case, involving the proposed relocation of part of certain technical specifications from the facility's license to its updated safety analysis report (USAR). *Id.* at 89. The part to be moved was the reactor vessel material surveillance program withdrawal schedule. This was proposed in response to the NRC Staff's encouragement in Generic Letter 91-01 that licensees seek license amendments to propose the removal of such withdrawal schedules from their technical specifications. *Id.* The petitioners in *Perry I* asserted that moving the withdrawal schedule would violate their right to notice and opportunity for a hearing on any future changes to the schedule. The Licensing Board found any such injury to be "speculative in view of the uncertainty over whether changes will ever be made to the withdrawal schedule," and also found no substantive underlying concrete injury that would confer standing. *Id.* at 91-92.

The Commission in *Perry I* concluded that the petitioners therein had satisfied threshold standing requirements, finding that "[t]he loss of the rights to notice, opportunity for a hearing, and opportunity for judicial review, constitutes a discrete and palpable -- not hypothetical -- injury . . . . linked to *this* amendment." *Id.* at 93. The Commission in reaching its decision cited *Lujan*, quoting the Supreme Court's language therein that procedural rights are "special," and that the "person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Id.* at 94 n.9 (citing *Lujan*, 504 U.S. at 572 n.7). The Commission noted that the Petitioners in *Perry I* had not provided as "cogent specification of their ultimate concerns" before the Licensing Board as before the Commission, where they depicted a reactor vessel embrittlement

scenario. *Perry I*, CLI-93-21, 38 NRC at 95. The Commission found, however, that the Petitioners had in their pleadings before the Licensing Board "sufficiently presented a link between the loss of procedural opportunities under section 189a and their asserted health and safety interests," noting the Petitioners' reference to the removal of "safety-significant" material from the operating license, and their expression of an interest in the "safe operation" of the Perry plant "given their residence near the facility." *Id.*

"Clearly," concluded the Commission with regard to the Petitioners in *Perry I,* "they seek to vindicate the loss of an alleged procedural right that relates to a potential substantive injury -- radiological harm to them as residents in the plant's vicinity. The Petitioners' radiological safety concerns unquestionably fall within the zone of interests regulated and protected by the Atomic Energy Act." *Id.* (footnote omitted). Noting that a member of the Petitioner lived within 15 miles of the Perry plant, sufficient to establish injury for standing if the proposed action involves an "obvious potential for offsite consequences," the Commission stated it could not conclude "that no potential for offsite consequences is posed by the loss of notice and opportunity for a hearing to challenge future changes to the withdrawal schedule. The material condition of the plant's reactor vessel obviously bears on the health and safety of those members of the public who reside in the plant's vicinity." *Id.* at 95-96 (citation omitted).

The Commission in *Perry I* also cited a Licensing Board's decision in another, similar case, also involving the Perry Nuclear Power Plant and the proposed deletion of "cycle-specific parameter limits from the . . . technical specifications," in which the board had found standing and an admissible contention. *Id.* at 93 (citing *Perry A*, LBP-90-25, 32 NRC 21). The Commission in *Perry I* found, "Similarly, we reject the . . . claim that the alleged procedural injury is speculative. . . . Although future changes to the withdrawal schedule are by no means certain, the likelihood of changes cannot be discounted, particularly when a goal of the license amendment is to simplify the required procedural steps for such changes." *Perry I*, CLI-93-21,

38 NRC at 93-94. The Commission rejected the *Perry I* Licensing Board's "compartmentalized reading of the Petitioners' pleadings," and stated:

> [A] fair reading of the Petitioners' claims indicates that, at bottom, [they] fear that if they are deprived of the opportunity to challenge future proposals to alter the withdrawal schedule, the surveillance of the Perry reactor vessel may become lax and prevent detection of a weakened reactor vessel, and ultimately result in an accidental release of radioactive fission products into the environment if the vessel should fail.

Id. at 94.

As in *Perry I*, "[a]lthough future changes to the [radiological effluent monitoring instrumentation] are by no means certain, the likelihood of changes cannot be discounted, particularly when a goal of the license amendment is to ['reduce costs by allowing NNECO to change the requirements without necessarily amending the license']." *See* NNECO Request to Amend at 1 (Feb. 22, 2000). And as in *Perry I*, a "fair reading of the Petitioners' claims indicates that, at bottom, [they] fear that if they are deprived of the opportunity to challenge future proposals to alter the [radiological effluent monitoring instrumentation], the surveillance of [routine radiological releases] may become lax and prevent detection of [increased releases] of radioactive fission products into the environment [that could endanger their health and safety]." *See Perry I*, CLI-93-21, 38 NRC at 94.

The Petitioners have raised health and safety issues related to alleged future changes that will allegedly lead to increased radiological effluent releases. According to the information recounted in the above Overview, changes to monitoring schedules and to setpoint calibrations are possible, and Mr. Klementowicz also posited the possibility that a licensee could decide to "no longer monitor their units at release points" and "make that change in their [REM]ODCM through their own review process." Tr. 106. As indicated above, it follows that such changes could result in any accidental or otherwise abnormal release of radiological effluents that occurred (of the sort the monitors are there to detect) not being detected or corrected as quickly

by human operators who check the monitors and can take action to prevent any further excessive release. And the Petitioners have an expert who can present evidence on the health effects of such relatively low-level radiation. Whether the Petitioners' evidence would lead to a ruling in their favor in a proceeding on the merits of this case is not certain, but such certainty is not required at this stage of the proceedings; rather, the standard is whether there is a "realistic threat" of injury. *See Sequoyah Fuels Corporation and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 74 (1994).

I find that a "realistic threat" of increased effluent releases of the sort alleged by the Petitioners has been shown, *see id.*, and that the Petitioners herein have, as in *Perry I*, "alleged a particularized procedural injury that [is] fairly traceable to the challenged amendment and . . . likely to be redressed by a favorable decision." *Id.* at 75. "Although the licensee's continued adherence to [regulatory dose limits] is required by Commission regulations, this change [would eliminate] the opportunity for a hearing in the event of future changes to the [radiological effluent monitoring instrumentation]." *Id.*[15] Given that even "minor radiological exposure" can constitute adequate grounds for finding standing, *see Seabrook*, LBP-98-23, 48 NRC at 162; *Atlas*, LBP-97-9, 45 NRC at 425; *Yankee Atomic*, LBP-96-2, 43 NRC at 70, CLI-96-7, 43 NRC at 246-248; *Oyster Creek*, LBP-96-23, 44 NRC at 158, and construing the petition in the Petitioners' favor, *see, e.g., Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995); *Seabrook*, LBP-98-23, 48 NRC at 162; *Atlas,* LBP-97-9, 45 NRC at 424, I cannot, at this stage in deciding threshold standing, conclude that "no potential for offsite consequences is posed by the loss of notice and opportunity for a

[15]The actual language used by the Commission in the *Sequoyah* case, in which the Commission explained its earlier ruling in *Perry I*, was: "Although the licensee's continued adherence to the withdrawal schedule is required by Commission regulations, this change eliminated the opportunity for a hearing in the event of future changes to the withdrawal schedule."

hearing to challenge future changes to the [radiological effluent monitoring instrumentation that could potentially result in failure to detect or correct as quickly increased radiological releases into the environment, which] obviously bears on the health and safety of those members of the public who reside in the plant's vicinity." *See Perry I*, CLI-93-21, 38 NRC at 95-96; *see also Yankee Atomic*, CLI-96-7, 43 NRC at 248.

Based upon the preceding analysis, I conclude that Petitioner CCAM on behalf of its members has demonstrated standing in this proceeding under 10 C.F.R. § 2.714(d)(1) and the authority of *Perry I*.

Admissibility of Contention

With regard to the admissibility of the Petitioners' contention, my colleagues fault the Petitioners for failing to cite a specific statutory or regulatory requirement that the technical specifications NNECO seeks to relocate to the REMODCM must remain in the operating licenses for Millstone Units 2 and 3; based on this absence of a citation to a statute or regulation, they find that the Petitioners fail to provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact, as required by 10 C.F.R. § 2.714(b)(2)(iii). In addition, my colleagues find that the Petitioners fail to provide references to documents or other sources, or adequate support under section 2.714(b)(2)(i), (ii), for their claim that the license amendment at issue will increase the types and amounts of effluents released offsite, which in effect nullifies, for my colleagues, the claim that increased effluents will cause increased risk of cancer and other adverse health effects. Finally, my colleagues note that the Petitioners fail to include with their contention any reference to the specific portions of the amendment application they dispute or any reasons for each dispute, as required by section 2.714(b)(2)(iii), and that neither the Petitioners' contention nor their proferred expert's Declaration specify whether the increased effluent releases underlying the

adverse health effects they allege will be within or violate the Commission's regulation on such effluents -- and thus, if the former, their assertion represents an improper challenge to the Commission's regulations, or, if the latter and the Petitioners are asserting that NNECO will intentionally violate the Commission's regulatory dose limits in the future, they have failed to support such a claim and no such conclusion may be presumed.

I approach the issue of the admissibility of the Petitioners' contention by looking first to the contention requirements themselves and to the Commission's Statement of Considerations that accompanied the requirements when they were adopted in their present form in 1989. The relevant portions of 10 C.F.R. § 2.714(b) state:

> (2) Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide the following information with respect to each contention:
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> (i) A brief explanation of the bases of the contention.
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> (ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing, 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.
>
> (iii) Sufficient information (which may include information pursuant to paragraphs (b)(2)(i) and (ii) of this section) to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute . . . .

In addition, section 2.714(d) provides in relevant part:

> . . . [A] ruling body or officer shall, in ruling on--
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> . . . .
>
> (2) The admissibility of a contention, refuse to admit a contention if:
>
> (i) The contention and supporting material fail to satisfy the requirements of paragraph (b)(2) of this section; or
>
> (ii) The contention, if proven, would be of no consequence in the proceeding because it would not entitle petitioner to relief.

The Statement of Considerations [hereinafter SOC] for the 1989 amendments to the contention requirements, which explains the Commission's basis for, and interpretation of, the

regulatory language quoted above, provides useful guidance on the proper application of the requirements -- guidance which is entitled to "special weight." *Long Island Lighting Company* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 290-291 (1988), *review declined*, CLI-88-11, 28 NRC 603 (1988). In the SOC, 54 Fed. Reg. 33,168 (Aug. 11, 1989), the Commission, in response to comments it had received on the proposed rule, noted that the requirement at subsection (b)(ii) above "*does not call upon the intervenor to make its case* at this stage of the proceeding, but rather to indicate what facts or expert opinions, *be it one fact or opinion or many, of which it is aware at that point in time* which provide the basis for its contention." *Id.* at 33,170 (emphasis added). Further, "[i]n addition to providing a statement of facts and sources, the new rule will also require intervenors to submit with the list of contentions *sufficient information (which may include the known significant facts described above) to show that a genuine dispute exists* between the petitioner and the applicant or the licensee *on a material issue of law or fact*. This will require the intervenor to read the pertinent portions of the license application. . . ." *Id.* at 33,170 (emphasis added).

The Commission in the SOC quoted the following language from *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):

> [A]n 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 § 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.

54 Fed. Reg. at 33,170 (emphasis added). Continuing, the Commission's SOC contains the following statements:

> The new rule will require that a petitioner include in its submission *some alleged fact or facts in support of its position sufficient to indicate that a genuine issue of material fact or law exists*. . . .

> . . . . [T]he rule will require that before a contention is admitted the intervenor have *some factual basis* for its position and *that there exists a genuine dispute* between it and the applicant. It is true that *this will preclude a contention from being admitted where an intervenor has no facts to support its position* . . . . The Commission believes it is a reasonable requirement that an intervenor be able to identify *some facts* at the time it proposes a contention to indicate that a dispute exists between it and the applicant on a material issue [and that it] *read the portions of the application . . . that address the issues that are of concern* to it and *demonstrate that a dispute exists* between it and the applicant on a material issue of fact or law.
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> . . . .
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> . . . . [T]he presiding officer shall not admit a contention to the proceeding if the intervenor fails to set forth the contention with *reasonable specificity* or establish a basis for the contention. In addition, the contention will be dismissed if the intervenor sets forth *no* facts or expert opinion on which it intends to rely to prove its contention, or if the contention fails to establish that a genuine dispute exists between the intervenor and the applicant . . . . [T]he use of this standard for the admission of contentions had been supported by the Federal courts in numerous instances. *Vermont Yankee Nuclear Power Corp. v. NRC*, 435 U.S. 519 (1978); *Independent Bankers Ass'n v. Board of Governors,* 516 F.2d 1206 (D.C. Cir. 1975); *Connecticut Bankers Ass'n v. Board of Governors,* 627 F.2d 245 (D.C. Cir. 1980). The court in the latter case emphasized that "a protestant does not become entitled to an evidentiary hearing merely on request, or on a bald or conclusory allegation that such a dispute exists. *The protestant must make a minimal showing that material facts are in dispute, thereby demonstrating that an 'inquiry in depth' is appropriate*." 627 F.2d at 251. The Commission's rule is consistent with these decisions.
>
> . . . . The Commission expects that at 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*. At the summary disposition stage the parties will likely have completed discovery and essentially will have developed the evidentiary support for their positions on a contention. Accordingly, there is much less likelihood that substantial new information will be developed by the parties before the hearing. Therefore, the quality of the evidentiary support provided in affidavits at the summary disposition state is expected to be of a higher level than at the contention filing stage.

Id. at 33,170-33,171 (emphasis added).

In the *Oconee* case, cited by my colleagues, the Commission stated that Petitioners "must develop a fact-based argument that actually and specifically challenges the application. . . . [A] contention 'that fails directly to controvert the license application . . . is subject to dismissal.' . . . Moreover, . . . it is not unreasonable to expect a petitioner to provide additional information corroborating the existence of an actual safety problem. Documents, expert

opinion, *or* at least a fact-based argument are necessary." *Duke Energy Corporation* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 341-342 (1999) (emphasis added). Continuing, the Commission stated:

> It is surely legitimate for the Commission to screen out contentions of doubtful worth and to avoid starting down the path toward a hearing at the behest of Petitioners who themselves have no particular expertise -- or expert assistance -- and no particularized grievance, but are hoping something will turn up later as a result of NRC Staff work.

Id. at 342.

The Petitioners in this case argue that there will be changes in the radiological surveillance and monitoring instrumentation covered by the technical specifications at issue, which will result in increased radiological effluents, which will in turn cause health problems. They have not "made their case," but, as indicated in the SOC for the contention rule, are not required to do so. Based upon the analysis that follows, I find they have provided sufficient information to show that a genuine dispute exists, specifically asserting that future changes will result in increases in radiological effluents that could harm their health, which is directly contrary to the position of the Applicant. Although they are not clear on the extent of such alleged increases, during the prehearing conference, after hesitating to "venture quite so far" as to speculate into the future and stating that the Petitioners' position is that the technical specifications should not be removed so that "then we shouldn't have to worry about the next step, about increased risk of actual radiological effluent emissions," Petitioners' Counsel responded to the question whether the Petitioners were arguing that changes in surveillance monitoring mechanisms and methods could lead to releases that would violate the limits set in the rules and in Appendix I, by stating, "Certainly," and that the Petitioners were concerned with both "routine permissible releases" and "impermissible accidental releases." Tr. 61-62, 67, 69.[16]

[16]To the degree the Petitioners challenge releases that would be within relevant

(continued...)

It is also recognized that the Petitioners have not specified which particular parts of the amendment request or which particular technical specifications at issue will result in the changes they allege, but make their allegations with regard to the complete amendment request. Contrary to my colleagues, however, I find it to be evident that the various interrelated parts of the relocated technical specifications at issue work together as a whole, such that the whole application is placed at issue, an approach I do not find to be foreclosed under section 2.714(b)(2)(iii). The Petitioners are clearly challenging the relocation of all the technical specifications at issue out of the Applicant's operating licenses for Units 2 and 3. And the Petitioners give reasons for their dispute with the Applicant over this relocation.

The Petitioners offer an expert in radiation and health issues -- only one expert at this point, but one is enough under the rule as interpreted in the Commission's SOC. In his Declaration, incorporated into the Petitioners' contention, this expert makes "references to . . . specific sources and documents," *see* 10 C.F.R. § 2.714(b)(2)(ii), including the Applicant's official reports of radiological effluent, epidemiological records, and various studies. Amended Petition at 5-7 (attached Mangano Decl.). From his Declaration, it appears Mr. Mangano may hold some opinions that might be viewed as somewhat unorthodox, but the merits of these

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[16](...continued)
regulatory limits, I agree with my colleagues that this would be challenging the regulation, which is not permissible in a proceeding such as this, and evidence would not be admitted on this issue were a hearing to be held. However, I do not find that it follows from alleging increased releases in violation of the rule that these would necessarily have to be intentional. It is not clear from the face of the Petition whether the increased radiological effluents the Petitioners allege would violate regulatory requirements, but neither is this excluded, nor are intentional or unintentional increases. And some clarification, as indicated in the text, was provided at the prehearing conference. In any event, there is no requirement in the contention rule or SOC that a contention include a specific allegation or citation of a regulatory violation, and the lack of this in the Petitioners' contention does not subtract significantly from the basic logic of the contention, which, as I indicate in the text, is fairly straightforward and self-evident.

views are not at issue at this stage in the proceedings,[17] absent a finding under section 2.714(d)(2)(ii) that "the contention, if proven, would be of no consequence in the proceeding because it would not entitle the petitioner to relief," which I do not find to be the case -- if all elements of the contention were proven, the petitioners would be entitled to relief.

With regard to the Petitioners' "claims upon which Mr. Mangano's allegations rest (i.e. the amendment will lower standards of radiological effluent monitoring and increase offsite effluent releases)," *see* Majority Opinion *supra* at section II.B, the Petitioners have referred to the Applicant's own statements (which refer to "changes [that] will not significantly increase the types and amounts of effluents that may be released offsite," *see* Amended Petition at 4, referring to NNECO Request to Amend at 3), to the relocation of the technical specifications at issue "in the era of deregulation and electric restructuring" leading to changes that will "lower standards," and to "record levels" and "excessive levels" of radiological effluents from the Millstone reactors. Amended Petition at 3-4. In addition, the Petitioners offer the fact, undisputed in NNECO's Answer, that the Applicant pleaded guilty in the U.S. District Court for the District of Connecticut on September 25, 1999, to felonies under the Atomic Energy Act, "including its submission of falsified records to the [NRC]." Amended Petition at 5. And since changes under the REMODCM are required to be documented and reported to the NRC, *see supra* note 10, there would appear to be an arguable "direct and obvious relationship between the character issue [of the guilty plea to submission of falsified records] and the licensing action in dispute" in this proceeding, sufficient for this character issue to be considered in assessing

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[17] *See* SOC for the new contention rule, 54 Fed. Reg. at 33,171, where the Commission notes that language in a previous version of the proposed rule, to the effect that a presiding officer was to refuse to admit a contention where "[i]t appears unlikely that petitioner can prove a set of facts in support of its contention," was deleted from the final rule in response to comments that this would suggest that the presiding officer is to prejudge the merits of a contention, because the Commission "recognize[d] the potential ambiguity of the proposed phrasing."

the probability of future changes that might lead to increased releases of effluents that might violate regulatory limits, which changes are required to be recorded and reported. *Commonwealth Edison Company* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 189-190 (1999); *see also Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 120 (1995); *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 30-32 (1993).

Although the Petitioners' contention is no doubt minimal in some particulars, it is not altogether devoid of a logic that is at least arguable to the extent necessary under the contention requirements and the Commission's SOC on them. As indicated above in the context of standing, the following adaptation of the Commission's language from *Perry I* illustrates the rather straightforward, self-evident nature of this logic, in any context: "[A] fair reading of the Petitioners' claims indicates that, at bottom, [they] fear that if they are deprived of the opportunity to challenge future proposals to alter the [radiological effluent monitoring instrumentation], the surveillance of [routine radiological releases] may become lax and prevent detection of [increased releases] of radioactive fission products into the environment [that could endanger their health and safety]." *Perry I*, CLI-93-21, 38 NRC at 94. To support their claims, the Petitioners in their contention offer "some facts and expert opinion," along with references to sources and documents of which the Petitioners are aware and on which they intend to rely to establish the facts they allege, and sufficient information to show that a genuine dispute exists with regard to material facts. It sets forth a basis that is "reasonably specific" and is not "vague and unparticularized," and the Petitioners do not rely on the possibility that the NRC Staff will "turn up something later," as the petitioners in *Oconee* did. *See* 54 Fed. Reg. at 33,170-33,171; *Oconee*, CLI-99-11, 49 NRC at 342.

Moreover, it is evident from the information gleaned at the prehearing conference and summarized in the above Overview, and from the Applicant's own statements, that the

relocation of the technical specifications at issue will very likely result in changes to the radiological surveillance and monitoring instrumentation -- which "will reduce costs by allowing NNECO to change the requirements without necessarily amending the license." *See* NNECO Request to Amend at 1 (Feb. 22, 2000). And these changes could indeed possibly, according to representatives of both NNECO and the Staff, result in any accidental or abnormal increased releases of radiological effluents of the sort the monitors are designed to detect not being detected or corrected as quickly as before the technical specifications at issue were relocated.

It is, of course, preferable in a case such as this, involving somewhat complex issues, to present a much more specific contention. On the other hand, the uncertain nature of the universe of possible future changes that might be undertaken inherently limits to some degree the level of specificity possible in describing exactly how such changes might occur. Relocation of the technical specifications at issue, which as Mr. Klementowicz observed involve a high level of detail, opens up a whole "one-step-removed" area of possible future changes that are necessarily uncertain at the present time. The *Perry* cases illustrate some of the complexities involved in cases in which technical specifications are proposed to be relocated out of a license -- in neither was it a quick or direct route through, among other things, consideration of the "nature and significance" of the technical specifications at issue, to the eventual outcome.

With regard to relocation of technical specifications generally, in *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315 (1996) (hereinafter *Perry II*), the Commission, in deciding an appeal from a ruling on the merits in the same case as *Perry I*, discussed the general policy that led to the license amendment request in that case (and in all cases involving applications to amend licenses by relocating technical specifications, including the instant case), as follows:

> By the early 1980s, the NRC Staff concluded that the burgeoning number of items commonly included in standard technical specifications was both diverting Staff and licensee attention from the most significant safety requirements and

> unnecessarily burdening agency and industry resources with a severalfold increase in license amendment applications. To remedy this trend, the Staff initiated a Technical Specifications Improvement Project. (citing 58 Fed. Reg. 39,132, 39,133 (July 22, 1993).) The project resulted in a policy to limit technical specifications to those items deemed most important to safety. (citing *id. at 39,135; see also* 60 Fed. Reg. 36,953, 36,957-58 (July 19, 1995).)
>
> As part of the new policy to streamline and improve technical specifications, the NRC Staff over the past several years has been identifying which items can be removed -- without safety consequences -- from the standard technical specifications. Items so identified can be transferred to the licensee's updated safety analysis report or some other licensee-controlled document.

Perry II, CLI-96-13, 44 NRC at 318. The Commission went on to note that "[i]n late 1990, the Staff concluded that the material specimen withdrawal schedule could be moved from the standard technical specifications to the licensee's updated safety analysis report." *Id.* Just as Generic Letter 89-01 encouraged the transfer of the monitoring instrumentation technical specifications in this case, Generic Letter 91-01 encouraged the transfer of the technical specifications containing the material specimen withdrawal schedule to the licensee's updated safety analysis report in *Perry II*, presumably because the Staff believed, as with Generic Letter 89-01, that they could be removed from the license "without safety consequences." *Id.*

In *Perry I*, the Commission had remanded the case to the Board for further proceedings to "resolve[ ], subject to our rules of practice on the admission and litigation of contentions, whether the removal of the withdrawal schedule from the technical specifications is indeed an unlawful act." *Perry I*, CLI-93-21, 38 NRC at 96. The Licensing Board had then, addressing the intervenors' arguments that the only effect of the amendment relocating the technical specifications at issue was "to remove the public from the process [of future changes to the material surveillance specimen withdrawal schedule] in violation of section 189a" of the Atomic Energy Act and "that the withdrawal schedule [was a material license issuance decision that would require a hearing under section 189a]," ruled in favor of the intervenors in that case. *See Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), LBP-95-17, 42 NRC 137, 139, 141 (1995). The Board found that, because it would require NRC approval, any

future change to the material specimen withdrawal schedule would be a *de facto* license amendment, thus entitling the Intervenors to notice and an opportunity for hearing under section 189a in the event of any future change to the withdrawal schedule. *Id.* at 149.

The Commission in *Perry II* reversed, finding that not all agency approvals granted to licensees constitute license amendments that would trigger section 189a hearing rights. The Commission's analysis was based instead on whether an NRC approval grants a licensee any "greater operating authority"; the "key consideration," arising from caselaw on the point, is whether the agency action supplements the existing operating authority prescribed in the license. *Perry II*, CLI-96-13, 44 NRC at 326-329 (citing *Kelley v. Selin*, 42 F.3d 1501, 1515 (6th Cir. 1995), *cert. denied*, 515 U.S. 1129 (1995); *Citizens Awareness Network, Inc. v. NRC*, 59 F.3d 284, 295 (1st Cir. 1995); *In re Three Mile Island Alert, Inc.*, 771 F.2d 720, 729-30 (3d Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986); *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1314-15 (D.C. Cir. 1984), *reh'g en banc on other grounds*, 789 F.2d 26 (1986), *cert. denied*, 479 U.S. 923 (1986). The Commission concluded that, since any changes to the material specimen withdrawal schedule that conformed to a standard of the American Society for Testing and Materials [hereinafter ASTM standard], which was referenced in Appendix H to 10 C.F.R. Part 50, would "not alter the Perry license [or] permit the Licensee to operate in any greater capacity than the original license prescribe[d]," and the Licensee was not authorized to do anything other than conform to the ASTM standard, no license modification or amendment was involved that would give the right to a hearing under section 189a. *Perry II*, CLI-96-13, 44 NRC at 327-329.[18]

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[18]The Commission also noted that the intervenors "explicitly did not contest the transfer of the schedule to the Perry USAR [updated safety analysis report]"; that "there is no statutory or regulatory requirement that every operational detail listed in the USAR be subject to a technical specification" (citing *Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 273 (1979)); and that "[c]onfirming compliance with a self-implementing, detailed,

(continued...)

In this case it is argued that there can be no changes that would result in any increases in effluents that would violate any regulatory limits, because the Applicant must still assure that it complies with the requirements and dose limits set forth at 10 C.F.R. § 50.59, Parts 20 and 50, and Appendix I to Part 50, and with dose rates and limits that will remain in the technical specifications. *See* NNECO Answer to Amended Petition at 9, 13; Staff Response to Amended Petition at 6, 8.[19] And further, in response to questioning by Judge Moore during the prehearing conference, both NNECO and the Staff stated that relocation of the technical specifications at

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[18](...continued)
industry standard does not call into play the various common reasons for requiring an adjudicatory hearing under Subpart G of 10 C.F.R. Part 2, such as the need to weigh various parties' observations or the utility of cross-examination." *Perry II*, CLI-96-13, 44 NRC at 328, 330. However, the Commission's analysis was primarily directed to the issue of the "key consideration" of whether an agency action would " 'supplement' the existing operating authority prescribed in the license" and thereby bring into play section 189a hearing rights. *Id.* at 329.

[19]Section 50.59 defines the criteria and circumstances under which a licensee may make changes in a facility or its procedures (one of which is that "[a] change to the technical specifications incorporated in the license is not required," 10 C.F.R. § 50.59(c)(1)(i)). Part 20, "Standards for Protection Against Radiation," includes among other things various dose limits, precautionary procedures, and record and reporting requirements. Appendix I to Part 50 sets forth "Numerical Guides for Design Objectives and Limiting Conditions for Operation to Meet the Criterion 'As Low As Is Reasonably Achievable' for Radioactive Material in Light-Water-Cooled Nuclear Power Reactor Effluents." Appendix I provides at section I that "levels of radioactive material in effluents to unrestricted areas [are to be kept] as low as practicable." Appendix I's numerical guides, at sections II.A and B, provide that "[t]he calculated annual total quantity of all radioactive material above background to be released . . . will not result in an estimated annual dose or dose commitment from liquid effluents for any individual in an unrestricted area from all pathways of exposure in excess of 3 millirems to the total body or 10 millerems to any organ," and that "[t]he calculated annual total quantity of all radioactive material above background to be released . . . will not result in an estimated annual air dose from gaseous effluents at any location near ground level which could be occupied by individuals in unrestricted areas in excess of 10 millirads for gamma radiation or 20 millirads for beta radiation," but that the Commission may specify a lower quantity to be released to the atmosphere if it appears that the previous design objective "is likely to result in an estimated annual external dose from gaseous effluents to any individual in an unrestricted area in excess of 5 millirems to the total body." Also, under section IV.A, if the quantity of radioactive material actually released during any calendar quarter is such that the resulting exposure would exceed one-half the design objective annual exposure, an investigation and certain corrective measures are to be taken.

issue will not give the Applicant any "greater operating authority." Counsel for the Petitioners, on the other hand, responded that such relocation "certainly does, or at least it gives [the Applicant] greater potential of exercising a greater operational authority." Tr. 124.

Approaching this issue from the standpoint of what would actually be involved in any decision to make any change, for example, to a surveillance frequency, a setpoint, or a monitoring point, under new technical specifications 6.15 for Unit 2 and 6.13 for Unit 3 any such change would require that a determination be made and documented that the change would not result in any failure to assure compliance with relevant regulatory provisions, and the Applicant must document and record "sufficient information to support the change(s) together with the appropriate analyses or evaluation justifying the change(s)." *See supra* note 10. Thus, in contrast to the ASTM standard, which in *Perry II* "establishe[d] specific technical criteria for determining where in the reactor vessel to place surveillance capsules, how many capsules should be used, and how often capsules should be removed for testing"; "provide[d] delineated parameters for Cleveland Electric to use in calculating an appropriate withdrawal schedule"; and was a "self-implementing, detailed, industry standard," *see Perry II*, CLI-96-13, 44 NRC at 328, 330; the determinations required for making future changes in this case appear to involve significant discretion and judgment -- discretion and judgment that NNECO was not previously authorized in making changes to surveillance schedules, setpoints, and monitoring points, when the specific requirements for them were contained in technical specifications in the license. And thus it would appear that relocating the technical specifications at issue would arguably "'supplement' the existing operating authority" of NNECO, at least to the extent of authorizing it to exercise significantly increased discretion in matters that were previously conditioned on requesting and being granted a license amendment. *See Perry II*, CLI-96-13, 44 NRC at 326-329.

The Commission in *Perry II* found, as indicated above, that the operating authority of the licensee therein would not be supplemented through any future changes to the material specimen withdrawal schedule, that such changes would not therefore constitute license amendments, and that the intervenors were therefore not deprived of any section 189a hearing rights. Near the end of its decision, the Commission included the following language, also quoted above by my colleagues in section II.B of its opinion:

> If the Intervenors believed that the nature and significance of the material specimen withdrawal schedule was such that it needed to remain in the Perry technical specifications -- as a specific term of the Perry license -- the Intervenors could have raised that argument in this proceeding. They instead concurred with the NRC Staff that there is no statutory or regulatory requirement that the withdrawal schedule remain in the Perry license.

Perry II, CLI-96-13, 44 NRC at 329.

The Petitioners herein clearly believe and have themselves stated, with no help from the Licensing Board, that the nature and significance of the radiological effluent surveillance and monitoring instrumentation technical specifications are such that they need to remain in NNECO's operating license. They provide a specific statement of the mixed issue of law and fact they raise, to the effect that relocating the technical specifications at issue "will deprive [them] of notice of proposed changes . . . of the opportunity for hearing and to comment and object to changes, which can only be projected to lower standards of radiological effluent monitoring . . . [and expose the public] to greater risk of radiation doses . . . ." They provide a brief explanation of the bases for the contention, including, as indicated above, the references to future changes, past record levels of effluents, the Applicant's guilty plea, and Mr. Mangano's evidence relating to health and safety effects of increased effluents. Amended Petition at 3-7. And they provide a concise statement of the alleged facts and expert opinion on which they rely, including references to sources of which they are aware and intend to rely.

My colleagues find this insufficient to show that a genuine dispute exists with the Applicant on a material issue of law or fact, concluding from the language quoted above that "the Commission was merely using a shorthand expression for the required explanation of the nexus between the relocated material and 10 C.F.R. §§ 50.36 or 50.36a -- the Commission's regulations detailing the contents of a plant's technical specification." *See* Majority Opinion *supra* at section II.B.

Of course, as suggested by my colleagues, if there is a regulatory requirement under section 50.36 or 50.36a that a technical specification remain in a license, then removing and relocating it would be "unlawful." It is noted in this regard that the Commission left the fourth criterion in section 50.36 ("[a] structure, system, or component which operating experience or probabilistic risk assessment has shown to be significant to public health and safety," 10 C.F.R. § 50.36(c)(2)(ii)(D)) open-ended, stating in response to a commenter who had suggested limiting the criterion to specific items, as follows:

> The Commission believes this is a more appropriate means to define how Criterion 4 will be used in practice, rather than to limit the structures, systems, and components captured by Criterion 4 to those items important to risk-significant sequences as defined in Generic Letter 88-20, Appendix 2, and reported in licensees' IPE [individual plant examination] reports. The Commission believes that this process will provide the NRC staff and the industry with additional risk insights, beyond those identified through the IPE program.

Continuing, the Commission observed:

> The same commenter said that the operating experience portion of the fourth criterion should be deleted because it is subjective and because no equipment would satisfy only that portion of the fourth criterion and none of the other criteria.
>
> While operating experience is an important part of PRA [probabilistic risk assessment], not all PRA models are sophisticated enough to capture all operating experience. The Commission believes that operating experience can play an important role in determining the safety significance of structures, systems, and components and that there will be no adverse impact by including operating experience as part of Criterion 4.

60 Fed. Reg. at 36956. The Commission also noted that

> . . . this rule [containing the four criteria] reflects the subjective statement of the purpose of technical specifications expressed by the Atomic Safety and Licensing Appeal Board in *Portland General Electric Company* (Trojan Nuclear Plant), ALAB-531, 9 NRC 263 (1979). There, the Appeal Board interpreted technical specifications as being reserved for *those conditions or limitations upon reactor operation necessary to obviate the possibility of an abnormal situation or event giving rise to an immediate threat to the public health and safety.*

Id. at 36955 (emphasis added).[20]

Clearly, if a petitioner explicitly alleges that a technical specification needs to remain in a license because it meets one of the criteria of section 50.36(c)(2)(ii) (or 50.36a, as suggested by my colleagues), this is the best and most straightforward means of posing an admissible contention asserting that a technical specification should remain in a license, provided all the requirements of section 2.714(b)(2), (d)(2) are met. I do not find, however, that this exhausts all avenues of approaching such a case, quite apart from the fact that nowhere in section 2.714(b)(2), (d)(2) or the SOC for the new contention rule is there any requirement that a petitioner cite to a specific statutory or regulatory section. There may also be an allegation that implicitly brings into play one of the four 50.36(c)(2)(ii) criteria. And the Commission's analysis in *Perry II* of when future changes to relocated technical specifications would trigger hearing rights under section 189a of the Atomic Energy Act also suggests that the inquiry is broader than that suggested by my colleagues -- that this inquiry may also include the question whether technical specifications should remain and not be removed from a license because such

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[20]The Licensing Board in *Perry A,* in ruling on the contention in that case (which was based upon alleged violation of section 189a of the Atomic Energy Act), applied the *Portland* standard and looked to how much discretion would be vested in a licensee in making future changes as the determinative factor in ruling on the contention and on the merits of the case. *Perry A*, LBP-90-25, 32 NRC at 23-28; LBP-90-39, 32 NRC 368, 370 (1990). Although *Perry A*, not having been considered by the Commission other than in *Perry I* in its discussion of standing, does not have precedential value on other issues, its analysis is found to be similar to that of the Commission in *Perry II*, and to be helpful in illustrating how granting a licensee greater discretion than it previously had could "supplement its operating authority."

removal would violate petitioners' future hearing rights under section 189a, which is essentially the argument posed by the Petitioners herein in their contention.

Whether or not any of the Petitioners' allegations implicitly bring into play one of the four section 50.36(c)(2)(ii) criteria,[21] it cannot be gainsaid that the Petitioners have implicitly raised their hearing rights under section 189a, in a context of alleged health and safety consequences of future changes to relocated provisions that were formerly license technical specifications. And given that cases involving the relocation of technical specifications do involve the taking away of "special" procedural rights under section 189a, connected to substantively complex matters involving future uncertainties, allowing for the kind of flexibility specifically contemplated in the Commission's SOC for the present contention rule seems especially appropriate in such cases -- provided at least the "minimal showing" that is required has been made. Petitioners must, of course, do more than merely request a hearing based on "bald or conclusory allegations." I find that the Petitioners have done more: notwithstanding that their petition contains some conclusory allegations, they have, as illustrated above, provided a specific statement of the mixed issue of law and fact they raise, along with a brief explanation of the basis of their contention, and an expert opinion that alleges health and safety issues and refers to various documents and alleged facts, all of which I find constitutes sufficient information to show that a genuine dispute exists with the Applicant on a material issue of law and fact, relating to the entire amendment application at issue.

With regard to the conclusory nature of some of their statements, the conclusory nature of much of what has been stated by *all* participants in this proceeding, *see supra* note 11, is likely related to, and to some degree is illustrative of, the unique nature of this type of case: in

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[21]Petitioners' Counsel did at the prehearing conference refer to a May 26, 1998, notice of violation issued to NNECO, relating to several items including NUREG-0737, which she argued might relate to "operating experience" under Criterion 4. Tr. 119.

contrast to the usual license amendment case, in which the application specifies what the actual change that is of interest will be and how it will occur, in a case involving the relocation of technical specifications the significant changes at issue will, as indicated above, occur in the uncertain future, in uncertain ways. And to respond, as the Staff does, to the Petitioners' allegations of potential future changes that could result in increased effluents harmful to health, that if in the future a licensee violates a regulatory requirement the Staff could issue a notice of violation, or that if an unresolved safety issue arises the Staff would have to become involved, does not address the issue of the public's right under section 189a, to seek a hearing on the appropriateness of the amendment relocating the technical specifications, in order to address the potential for health and safety risks involved in any future proposed changes in advance, before they can occur -- and possibly also to seek future hearings in the event of future changes themselves (assuming in each instance, of course, that petitioners are able to make appropriate showings as to standing and the admissibility of contentions).

To hold petitioners in a case such as this to an especially strict standard of specificity with regard to contentions relating to such potential future events, which standard goes beyond what section 2.714(b)(2) on its face requires, I find to be unjustified in light of the Commission's statements in its SOC to the contention requirements. Although the Petitioners would be expected at a hearing or even a summary disposition stage to describe in some detail the kinds, mechanisms, and probabilities of future changes that could lead to the resulting increased effluents harmful to health that they predict, and in addition to provide detailed and supported explanation of the manner and extent to which such results would occur, they are not expected to so "make their case" at the contention stage of this proceeding. The Petitioners must be held to the Commission's contention requirements, and it is their burden to demonstrate that their contention meets the requirements sufficiently to warrant further inquiry, but no more than this is required at this stage of proceedings.

Based upon the preceding analysis, I conclude that the Petitioners have made the necessary minimal showing, under 10 C.F.R. § 2.714(b)(2), (d)(2) and relevant case law, of the admissibility of their contention to demonstrate that "further inquiry" would be appropriate in this case. *See SOC*, 42 Fed. Reg. at 33,171; *Yankee Atomic*, CLI-96-7, 43 NRC at 249.

/RA/

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Ann Marshall Young, Chair
ADMINISTRATIVE JUDGE

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
NORTHEAST NUCLEAR ENERGY COMPANY	)	Docket Nos. 50-336/423-LA
	)	
	)	
(Millstone Nuclear Power Station, Units Nos. 2 and 3)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (LBP-01-10) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 30th day of March 2001