

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of:)
)
Dominion Nuclear Connecticut, Inc.)
)
(Millstone Nuclear Power Station,)
Units 2 and 3))

Docket Nos. 50-336
50-423

DOMINION NUCLEAR CONNECTICUT, INC.'S BRIEF IN OPPOSITION
TO APPEAL BY CONNECTICUT COALITION AGAINST MILLSTONE
AND STAR FOUNDATION OF LBP-01-10

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April 23, 2001

Template = SECY-021

SECY-02

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I. INTRODUCTION

In accordance with 10 C.F.R. § 2.714a(a), Dominion Nuclear Connecticut, Inc. ("DNC")¹ herein responds in opposition to the appeal ("Petition for Review") filed on April 9, 2001, by the Connecticut Coalition Against Millstone ("CCAM") and STAR Foundation ("STAR") (collectively, "Appellants"). The Appellants are appealing the decision of the Nuclear Regulatory Commission ("NRC") Atomic Safety and Licensing Board ("Licensing Board"), issued on March 29, 2001, denying their petition to intervene

¹ At the time this proceeding began, the licensee for Millstone Units 2 and 3 was Northeast Nuclear Energy Company ("NNECO"). On March 9, 2001, the NRC granted the request to transfer the operating licenses for Millstone Nuclear Power Station, Units 2 and 3, from NNECO and the selling co-licensee owners to DNC, an indirectly, wholly-owned subsidiary of Dominion Energy. The closing of the transaction involving the sale of Millstone Units 2 and 3 was completed, and the conforming license amendment changes were issued, on March 31, 2001. Accordingly, DNC is now the operating licensee and party in interest in this matter. For accuracy and clarity, the caption above has been revised to reflect the NRC-approved license transfer.

in this matter.² See *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Units 2 and 3), LBP-01-10, 53 NRC __ (Mar. 29, 2001). For the reasons discussed herein, the Licensing Board's decision in LBP-01-10 should be upheld.

II. STATEMENT OF CASE HISTORY

A. *The Amendment at Issue*

The license amendment request ("LAR") at issue in this proceeding was submitted to the NRC on February 22, 2000, and concerned 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 relocation is consistent with the requirements of 10 C.F.R §§ 50.36(c)(2)(ii) and 50.36(c)(3), which describe the limiting conditions for operation ("LCOs") and associated surveillance requirements ("SRs") for which Technical Specifications must be established. Also, consistent with 10 C.F.R. § 50.36a(a), the Technical Specification changes include a new programmatic Technical Specification that addresses the radioactive effluent monitoring program, specifically mandating the related operating procedures and the specifying procedures for processing future changes. The RETS relocation is consistent with the Commission's "Final Policy Statement on Technical Specifications Improvements for Nuclear Power Reactors"³

² Appellants' appeal was styled as a "Petition for Review" pursuant to 10 C.F.R. § 2.786. Under NRC regulations, however, an appeal from a decision denying an intervention petition was more properly lodged in accordance with 10 C.F.R. § 2.714a. For purposes of this brief, DNC is treating the filing as a proper appeal and brief in accordance with 10 C.F.R. § 2.714a.

³ 58 Fed. Reg. 39132, 39136 (1993), as amended, 60 Fed. Reg. 36953 (1995).

("Final Policy Statement"), with Generic Letter ("GL") 89-01,⁴ and with NUREG-1431 and NUREG-1432.⁵ The amendment 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.⁶

⁴ "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" (January 31, 1989).

⁵ NUREG-1431 and NUREG-1432 are the Improved Standard Technical Specifications for Westinghouse and Combustion Engineering plants, respectively. Millstone Units 2 and 3 employ Combustion Engineering and Westinghouse nuclear steam supply systems, respectively.

⁶ The Appellants on appeal question one statement in the LAR cover letter stating that "[t]he approval of this amendment is needed by [August 31, 2000] to support the ongoing effort to eliminate Millstone Unit 2 and 3 dependence on the Millstone Unit No. 1 Stack Gas High Range Radiation Monitor." Petition for Review, at 3, 8. Appellants argue that this one statement suggests that "other substantive issues concerning high range radiation monitoring" are at issue in the LAR. However, the amendment request is indeed administrative. No hardware changes are involved in the amendment or approved by the amendment. As a separate matter, as part of isolating and decommissioning Millstone Unit 1, the licensee did identify the need to eliminate obsolete normal and high range gas radiation monitors in the Millstone Unit 1 stack previously credited for Millstone Unit 2 and Unit 3, and to instead credit Millstone Unit 2 and Unit 3 dedicated monitors. The Unit 2/Unit 3 change could have been processed before or after the LAR was approved. The licensee's preference was to make the change after the amendment, under the procedures of 10 C.F.R. § 50.59. Hence, the LAR requested approval of the amendment by a certain date. In any event, nothing in the amendment here at issue was directed to seeking approval of the change. Note that the LAR was incorrect in referring to the Unit 1 Stack Gas "High Range" monitor. In actuality, a Unit 1 stack normal range monitor provided the monitoring function for normal Unit 2 and Unit 3 releases; the stack high range monitor provided post-accident monitoring capability not at issue in the present amendment. The LAR should have referred to the Unit 1 Stack Normal and High Range Radiation Monitors.

B. Procedural History

On September 8, 2000, CCAM and STAR filed their original request for hearing/petition for leave to intervene in response to the NRC's notice of opportunity for hearing, 65 Fed. Reg. 48744, 48754 (2000). The petitioners proposed only one contention for hearing. On September 19, 2000, the Licensing Board was established to preside over the proceeding. *See* 65 Fed. Reg. 57627 (2000). On September 25, 2000, NNECO — as the operating licensee at the time — filed its response to the Petition and opposed it for failure to adequately demonstrate standing in this matter and for failure to set forth a contention with adequate basis and within the scope of this proceeding. *See* Northeast Nuclear Energy Company's Answer to Request for a Hearing and Petition for Leave to Intervene (September 25, 2000) ("NNECO's Answer"). On September 28, 2000, the NRC Staff filed its response to the Petition, and opposed it on the same grounds as did NNECO.

On October 6, 2000, the Licensing Board issued a scheduling order, setting a deadline by which the Appellants could amend their petition and file their final contentions. *See* Licensing Board Scheduling Order (Setting Schedule for Proceedings) (Oct. 6, 2000) ("Scheduling Order"). Subsequently, on October 27, 2000, the Appellants filed their Amended Petition, which attempted to address the standing deficiencies for CCAM by the addition of the affidavit of Mr. Joseph Besade. The Appellants also reiterated, verbatim, the sole proposed contention, and added the unsigned affidavit of

Joseph Mangano as support for that proposed contention.⁷ On November 8, 2000, 12 days after the applicable deadline set by the Licensing Board, Appellants filed, without any motion or showing of good cause, an affidavit from STAR Foundation member, Christine Guglielmo, to address the standing of STAR.

On November 17, 2000, NNECO filed its response to the CCAM and STAR Amended Petition, arguing that CCAM and STAR still had not satisfied the threshold standing requirements and had not proposed an admissible contention. *See* Northeast Nuclear Energy Company's Answer to Amended Petition to Intervene (Nov. 17, 2000) ("NNECO's Answer to the Amended Petition"). The NRC Staff filed on the same day and took a similar position.

On November 28, 2000, the NRC Staff issued the RETS amendment and a Final Determination of No Significant Hazards Consideration. 65 Fed. Reg. 75737 (2000). NNECO completed implementation of the subject amendment at Units 2 and 3 on January 25, 2001, by relocating the RETS to the REMODCM.

The Licensing Board conducted a prehearing telephone conference on December 7, 2000, to discuss the Appellants' standing and admissibility of the proposed contention. The Licensing Board subsequently issued LBP-01-10 on March 29, 2001. By a two-to-one majority, the Licensing Board concluded that the Appellants had not proffered an admissible contention.

⁷ The Amended Petition also indicated that it included the affidavit of another individual, Mr. John Thatcher (of unspecified affiliation), but no such affidavit was actually included with the Amended Petition.

III. ISSUE PRESENTED

Whether the Licensing Board properly denied the Appellants' petition to intervene in this matter.

IV. ARGUMENT

As discussed below, the request for hearing was properly denied and the appeal should be rejected. As found by the majority of the Licensing Board, the Appellants did not proffer an admissible contention. Because there was no admissible contention, the majority did not reach the question of the Appellants' standing. As was discussed in NNECO's Answer and NNECO's Answer to the Amended Petition, the lack of standing was a completely separate basis for denying the petition. Both the admissibility of the proposed contention and the standing question are addressed below.

A. *The Licensing Board Correctly Determined That the Appellants' Sole Contention Is Inadmissible*

The Appellants, given two opportunities, proposed only one contention. Appellants' sole contention, quoted in the Petition for Review at pages 3-4, argued that moving the RETS to the REMODCM "will deprive the public of notice of proposed changes to the radiological liquid and gaseous effluent monitoring instrumentation" and "will deprive them of the opportunity for hearing and to comment and object to changes." As a consequence of this alleged deficiency, and not as a separate contention, the Appellants speculated that "future changes can only be projected to lower standards of radiological effluent monitoring" and that the amendment therefore "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." Appellants further argued

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 effects.” On the alleged “greater risk of cancer, immunodeficiency diseases and other adverse effects,” Appellants provided the unsigned Affidavit from Joseph Mangano.

Notwithstanding all of the speculation about future changes, and the increased effluents and radiological harm that will supposedly result, the proposed contention raises only one central legal issue: whether the Millstone RETS can, under applicable statutory and regulatory requirements, be removed to the REMODCM. Based on reasoning reflected in *Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1)*, CLI-96-13, 44 NRC 315 (1996) (hereinafter “*Perry IP*”), and cited by the Licensing Board, this is not a genuine issue and it cannot be admitted. The Appellants failed utterly to provide any basis for an argument that the RETS must remain a license condition. The factual arguments regarding future changes, alleged increased radiological releases, and alleged health effects, are speculative at best, and in any event do not address the issue legitimately raised by the present license amendment. Moreover, the Mangano Affidavit in particular raises a generic challenge to the Commission’s regulations related to the health effects of low level radiological effluents, and as such raises matters far beyond the scope of the present proceeding.

1. Standards for Admitting Contentions

To gain admission as a party, a petitioner for intervention must proffer at least one admissible contention for litigation. 10 C.F.R. § 2.714(b)(1). A petitioner must

specify the particular issue of law or fact and provide: (1) a brief explanation of the basis for the contention; and (2) a concise statement of the alleged facts or expert opinion that support the contention. 10 C.F.R. § 2.714(b)(2). The contention should refer to those specific documents or other sources of which the petitioner is aware and upon which he “intends to rely in establishing the validity of [the] contention.” *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 333 (1999); *see also Final Rule, Rules of Practice for Domestic Licensing Proceedings — Procedural Changes in the Hearing Process*, 54 Fed. Reg. 33168, 33170 (Aug. 11, 1989) (“Final Rule”). It is the petitioner that has the obligation to formulate the contention and provide the necessary information to satisfy Section 2.714(b)(2). *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 and 3), CLI-98-17, 48 NRC 123, 125 (1998). The contention and bases offered must establish that a “genuine dispute” exists with the applicant on a “material” issue of law or fact. 10 C.F.R. § 2.714(b)(2)(iii). The dispute at issue is “material” if its resolution would “make a difference in the outcome of the licensing proceeding.” *See* Final Rule, 54 Fed. Reg. at 33172.

As specifically recognized by the majority of the Licensing Board, there are long-established principles of NRC hearings that come into play in this matter. LBP-01-10, slip op at 9. A contention is only admissible if it is within the scope of the license amendment proposed. *Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Units 1 and 2), ALAB- 739, 18 NRC 335, 339 (1983). Licensing boards have jurisdiction only over those matters that the Commission delegates to them in the hearing notice or referral order. *Duke Power Co.* (Catawba Nuclear Power Station, Units 1 and 2), ALAB-825, 22

NRC 785, 790 (1985). Moreover, a contention challenging the Commission's regulations is not admissible. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-8, 29 NRC 399, 416-17 (1989); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-87-12, 26 NRC 383, 395 (1987); *see also* 10 C.F.R. § 2.758. These principles in particular dictate that the matters raised by the Appellants — alleging health effects from normal, permissible operating radiation releases — are inappropriate for adjudication.

2. There is No Basis in Law or Fact for the Contention Alleging “Deprivation” of Notice and Opportunity for Hearing on Future Changes to the Relocated Requirements

The Appellants' core claim is that relocation of the RETS from the Millstone Technical Specifications to a licensee-controlled document will deny its members notice and an opportunity for hearing related to future “changes to the Millstone radiological liquid and gaseous effluent monitoring instrumentation.” This contention must fail as a matter of law. As recognized by the majority of the Licensing Board, the Appellants failed to provide any basis for the assertion that the details of the radiological effluent programs need to be in the Technical Specifications. Hence, there is no right to a hearing on future changes to these details. Appellants have not been “deprived” of any right and there is no “genuine dispute” regarding a “material” issue that can be admitted in this proceeding.

Section 182a of the Atomic Energy Act (“AEA”), 42 U.S.C. 2239(a), establishes the statutory requirements for the Technical Specifications for production and

utilization facility license applications.⁸ Section 182a does not by its terms require that the details of the radiological effluent programs, such as LCOs and SRs for monitoring equipment, be included in the Technical Specifications. Moreover, Section 182a empowers the Commission with the discretion to determine, by rule or regulation, the content of the Technical Specifications.

In 1993, the Commission issued a Final Policy Statement which provided guidance for evaluating the required scope of the Technical Specifications and improving Technical Specifications by removing unnecessary requirements to other licensee-controlled documents. The Final Policy Statement included four criteria to be used in determining which of the LCOs and associated SRs should remain in the Technical Specifications. Final Policy Statement, 58 Fed. Reg. 39132 (1993). The Commission's direction was that requirements that fall within or satisfy any of the criteria in the Final Policy Statement should be retained in the Technical Specifications, and those requirements that do not fall within or satisfy these criteria may be relocated to licensee-controlled documents, such that later amendments may not require prior NRC approval.⁹

⁸ Section 182a of the AEA requires that "the applicant shall state such technical specifications, including information of the amount, kind, and source of special nuclear material required, the place of the use, the specific characteristics of the facility, and such other information as the Commission may, by rule or regulation, deem necessary in order to enable it to find that the utilization or production of special nuclear material will be in accord with the common defense and security and will provide adequate protection to the health and safety of the public."

⁹ The four criteria for assessing inclusion in the Technical Specifications are: (1) installed instrumentation that is used to detect, and indicate in the control room, a significant abnormal degradation of the reactor coolant pressure boundary; (2) a process variable, design feature, or operating restriction that is an initial condition of a design basis accident or transient analysis that either assumes the failure of or presents a challenge to the integrity of a fission product barrier; (3) a structure, system, or component that is part of the primary success path and

In 1995, the Commission codified the four criteria in 10 C.F.R. § 50.36(c)(2)(ii). 60 Fed. Reg. 36953 (1995). In addition, specific regulatory requirements for Technical Specification content applicable to radioactive effluent control programs are included in 10 C.F.R. § 50.36a.

There are no provisions in either Sections 50.36 or 50.36a that require that operational details for radiological effluent programs, of the type to be relocated to the REMODCM under the amendment at issue, be included in the Technical Specifications. As specifically addressed in the LAR, the amendment involves relocating LCOs and related surveillance requirements for equipment that monitors routine liquid and gaseous radiological effluents. The LCOs and SRs being relocated to the REMODCM do not meet the requirements of 10 C.F.R. § 50.36 and therefore are appropriate for removal from the Technical Specifications. *See* LAR, Attachment 1, page 9. Consistent with GL 89-01, the LAR identified the programmatic controls to be included in the Technical Specifications, applicable to any future changes to the specific requirements of the REMODCM. For example, the amendment adds requirements in Section 6 (“Administrative Controls”) of the Technical Specifications that will ensure that all licensee-initiated changes to the REMODCM are justified, documented, and reported to the NRC as part of or concurrent with the Radioactive Effluent Release Report for the period in which any change to the REMODCM was made. In addition, Section 6

which functions or actuates to mitigate a design basis accident or transient that either assumes the failure of or presents a challenge to the integrity of a fission product barrier; and (4) a structure, system, or component which operating experience or probabilistic risk assessment has shown to be significant to public health and safety.

specifically requires a determination that licensee initiated changes will maintain the level of radioactive effluents as required by the existing regulations.¹⁰ See LAR, Section 6.15, Technical Specifications, page 6-24.

In their pleadings, the Appellants did not allege and did not provide any legal basis, factual basis, or expert opinion that would establish that the requirements of the RETS to be moved to the REMODCM meet the regulatory criteria of 10 C.F.R. §§ 50.36 or 50.36a and must therefore remain in the Technical Specifications.¹¹ The unsigned Mangano Affidavit, devoted to alleging health effects from normal low level radiological releases, certainly did not address the issue and therefore did not support the contention.¹² At the prehearing conference, the Appellants attempted to retrofit an argument that the details are required to be in Technical Specifications by 10 C.F.R. § 50.36(c)(1)(ii)(A). (Tr. 56). But this argument, in addition to being late, was off-base.

¹⁰ The existing regulations cited in Section 6 that apply to monitoring and controlling radiological effluents are: 10 C.F.R. § 20.1302, 40 C.F.R. Part 190, 10 C.F.R. § 50.36a, and Appendix I to 10 C.F.R. Part 50. The NRC Staff will monitor continued compliance with the regulations as part of the inspection and enforcement program. Interested parties can address potential compliance issues through the process afforded by 10 C.F.R. § 2.206.

¹¹ At one point during the prehearing conference, a suggestion was made by the dissenting member of the Licensing Board that the LCOs and SRs might meet Criterion 4. (Tr. 47-48). No basis for this argument was ever provided by the Appellants, however, and it was rejected by the licensee. (Tr. 79-80). These instruments are not risk-significant pursuant to 10 C.F.R. § 50.65(a)(4).

¹² In discussing the requirements for successfully pleading a contention, the dissenting member of the Licensing Board specifically and erroneously credited the Appellants' "expert" in radiation and health issues. LBP-01-10, slip op. at 51. Even assuming his "expertise" in these health effects issues, however, nothing in the pleading or the affidavit suggested any expertise, qualifications, or even an opinion with respect to low level radiation monitoring equipment and the requirements of the NRC with respect to the need for Technical Specification LCOs and SRs for that equipment.

LCOs and SRs such as those involved in the LAR are governed by Sections 50.36(c)(2)(ii) and 50.36(c)(3). Section 50.36(c)(1)(ii) deals with safety limits and limiting safety system settings — none of which are affected by the amendment. (Tr. 78-79).¹³

Because there is no basis in the AEA, or in the applicable NRC regulations, or in the Appellants' brief, to suggest that the radiological effluent program LCOs and SRs must be included in the Technical Specifications, there is no legal basis to contend that notice and an opportunity for hearing are required for future changes to these requirements. Section 189a of the AEA only requires that the Commission provide notice and an opportunity for hearing to any member of the public whose interest might be affected by a proceeding to grant, revoke, renew, or *amend* an operating license. In the absence of an *amendment* to the license, *there is no right to notice and opportunity for hearing*. The proposed contention is an exercise in circular reasoning. The Appellants argue that the RETS details must remain in Technical Specifications to create a hearing opportunity on future changes, merely because they want a hearing on future changes. Under the law, however, there is only a right to a hearing on future changes if the requirements need to be in Technical Specifications in the first place.¹⁴

¹³ In the Millstone Technical Specifications, for both Units 2 and 3, LCOs and SRs are in Section 3.0. Safety limits and limiting safety settings are set forth in Section 2.0. None of the latter are changed by the amendment at issue. *See also* LBP-01-10, slip op. at 15.

¹⁴ In essence, the contention is no more than a truism that would apply to any Technical Specifications improvement license amendment. Taking an LCO or SR out of Technical Specifications may indeed eliminate the need for a license amendment, and the ensuing regulatory process, for certain future changes. This,

In *Perry II*, the Commission addressed whether information could be removed from the Technical Specifications notwithstanding the potential impact on future Section 189a notice and hearing rights. In that case the intervenors asserted that removal of the material specimen withdrawal schedule from the Technical Specifications would deny Section 189a notice and hearing rights for any future changes to that schedule. The intervenors argued that, because the NRC would be required to approve any future changes to that schedule, any future approval would be a *de facto* license amendment triggering Section 189a notice and hearing rights. *Perry II*, CLI-96-13, 44 NRC at 326. The Commission rejected the argument. The Commission recognized that Congress provided hearing rights for only certain classes of agency actions and that if a form of action does not fall in those categories, there are no hearing rights. *Id.* Further, the Commission found that, even though future changes were in that case subject to NRC review, the NRC's approval would not permit the licensee to operate "in any greater capacity" than originally prescribed and all relevant safety regulations and license terms would remain applicable. Accordingly, the NRC approval of future changes would not "amend" the license and Section 189a rights would not apply. *Id.*

The *Perry II* case does not present precisely the same circumstances as the present case, but the logic of the decision is determinative here. The intervenors in *Perry II* did not argue (as the Appellants do here) that it was improper to remove the withdrawal schedule from the license. *Id.* at 320. Rather, the argument centered on the requirement

of course, does not make the Technical Specifications improvement amendment improper.

that the material specimen withdrawal schedule (and by implication, changes to the schedule) be approved by the NRC in accordance with Appendix H to 10 C.F.R. Part 50. In the present case, there is no general requirement for an NRC approval of future REMODCM changes that could even be argued, as in *Perry II*, to be an amendment. Unlike *Perry II*, future changes to the details of the radiological effluents programs will not necessarily involve any NRC licensing action or approval.¹⁵ But, in any event, future changes will not amount to operation “in any greater capacity” than is presently allowed because changes will not and cannot impact compliance with the existing normal operating radiological effluent limits. Therefore, as in *Perry II*, there would be no license amendment — *de facto* or otherwise — and Section 189a notice and hearing rights are not remotely applicable.¹⁶

The majority of the Licensing Board correctly pointed to the following language from *Perry II* directly germane to the present situation:

If the Intervenor 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 Intervenor could have raised that

¹⁵ If a specific proposed change is evaluated in accordance with the screening process of the new programmatic controls and an amendment is required, the amendment process will be followed — including the notice requirements.

¹⁶ As is further discussed below, the dissenting member of the Licensing Board incorrectly reads *Perry II* to invite a speculative discussion of whether future changes in the present case will lead to any greater operating authority. LBP-01-10, slip op. at 58-59. This is an unnecessary detour. In discussing whether there would be greater operating authority, the Commission in *Perry II* was focused on the required Appendix H approval of future changes to the withdrawal schedule, and whether this approval would be equivalent to an “amendment” triggering hearing rights. There is no analogue to the Appendix H approval here (*i.e.*, an approval that would be required independent of the Technical Specification status).

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.

While the Appellants here (unlike in *Perry II*) never explicitly agreed that there is no statutory or regulatory requirement that the Technical Specifications at issue remain in the license, it was — as in *Perry II* — incumbent upon the Appellants to demonstrate that the details of the RETS are of the “nature and significance” that they need to remain in the Technical Specifications. The Appellants did not meet that burden. Contrary to the dissent, no reading of the threshold requirements of 10 C.F.R. § 2.714 could suggest that Appellants ever met the necessary burden on the relevant point.

In essence, the dissenting member of the Licensing Board argues that the Appellants’ contention is sufficient because it alleges health effects from future, potential changes — that this is somehow a sufficient basis for the argument that the LCOs and SRs must remain in Technical Specifications. The dissent acknowledges that the Appellants “have not ‘made their case’” and that “the Appellants’ contention is no doubt minimal in some particulars” (LBP-01-10, slip op at 48, 53), but nonetheless finds the basis sufficient. Fundamentally, this reasoning ignores that there is no basis in the AEA, the regulations, the Commission Technical Specifications policy, or — perhaps most importantly — in the petition itself for an argument that the RETS details are required to be included in Technical Specifications. The Appellants have never shown any support for the argument that the RETS requirements at issue are required to be in Technical Specifications and that they have an entitlement to a hearing on future changes. The approach taken by the dissent would completely frustrate the Commission’s requirements

for pleading an admissible contention under 10 C.F.R. § 2.714. *Compare Ocone*, CLI-98-17, 48 NRC at 125 (“it is the responsibility of the petitioner to provide the necessary information to satisfy the basis requirement for the admission of its contentions”). The contention was properly dismissed by the majority under reasoning similar to that of the Commission in *Perry II*.

3. The Secondary Assertions of Increases in Normal Radiological Effluents and Resulting Radiation Injuries Are Speculative, Remote, and Outside the Scope of This Proceeding

As an adjunct to the hearing rights argument, the proposed contention specifically asserted the potential for future changes and future increases in radiological effluents from the Millstone units. The Appellants on appeal, and the dissenting member of the Licensing Board, have focused heavily on speculating on what those changes might be and on the potential impacts of such changes. Given the nature of the amendment, however, the issue before the Licensing Board was whether the RETS details must be in Technical Specifications. Future changes are not now at issue and all of the speculation regarding possible impacts is beyond the scope of this proceeding.

As stated in the LAR, the amendment — in and of itself — is administrative and does not involve any change to plant operation, radiation monitoring, or radiological effluent releases. *See, e.g.*, LAR, Attachment 1, page 11. With respect to equipment changes or surveillance changes that might follow the amendment, those changes are not the subject of the LAR. Completely consistent with the AEA and the Commission’s regulations, those changes — once identified in concrete terms — will be properly evaluated under the change controls that will apply at the time. These controls

include the new programmatic Technical Specifications for the radiological monitoring program and, where applicable, 10 C.F.R. § 50.59. Moreover, regardless of any changes to LCOs and SRs, the normal operating effluent limits established by the NRC's substantive requirements related to radiological effluents (*e.g.*, 10 C.F.R. Part 20 and Part 50, Appendix I) will continue to apply.

To support the assertion of increased effluents and other changes, Appellants continue to refer to a statement in the LAR that there will be "no significant increase in the type and amounts of effluents that may be released." Petition for Review, at 3. This statement was included in the summary of Environmental Considerations in the LAR cover letter (at page 3). From this statement Appellants have jumped to the conclusion that there *will be* increases in radiological effluent releases. Appellants have repeatedly ignored that the "no significant increase" language is drawn from a requirement of 10 C.F.R. § 51.22 related to assessing the need for environmental review. The conclusory statement in the LAR does not provide any basis to conclude that there will in fact be an increase (insignificant or otherwise) in radiological effluent releases. Appellants offered no factual basis or expert opinion to support their assertion. *See* LBP-01-10, slip op. at 17.

The Mangano Affidavit offered with the contention was entirely related to the "risk of cancer, immunodeficiency diseases and other adverse effects" from low level radiological effluents from Millstone that might, hypothetically, result from future changes. In the Affidavit, Mr. Mangano charges that in the past the releases to the air at Millstone have been at "excessive levels," that "[s]tandards of effluent monitoring

instrumentation should be tightened,” and that he has prepared books and articles on alleged health effects from low level radiation. None of this, however, bears any relationship to the present license amendment application. If a hearing were to be held on the amendment, the scope of that hearing would extend to no more than whether the RETS can be re-located to the REMODCM under NRC regulations and guidance. This is precisely the issue that Appellants and Mr. Mangano did not address.

The radiation monitors governed by the RETS are directed at detecting normal operational releases as authorized by 10 C.F.R. Parts 20 and 50.¹⁷ In effect, the Appellants and Mr. Mangano are challenging the Commission’s radiological release requirements, based on the alleged health effects of low level radiation. A challenge to the existing regulations and the release levels allowed by those regulations must be pursued as a generic matter with the Commission. *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-08, 29 NRC 399, 417 (1989) (pursuant to Section 2.758, adjudicatory hearing not a permissible forum for a challenge to NRC regulations), and *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-89-10, 29 NRC 297, 299 (1989) (“It is well established that a party may not directly challenge a Commission regulation in an agency adjudicatory proceeding.”).

At the prehearing conference, and now on appeal, the Appellants have followed the lead of the dissenting Licensing Board member and focused on the possibility and effects of future changes to surveillance requirements for these radiation

¹⁷ These monitors are not to be confused with Regulatory Guide 1.97 post-accident monitoring equipment. Post-accident monitoring equipment is addressed in separate Technical Specifications that are unaffected by the amendment.

monitors. The Appellants now argue (Petition for Review, at 7) that NNECO “acknowledged” a potential increased risk to the public from future changes, for example if a surveillance frequency for monitoring equipment was reduced. NNECO, however, did not acknowledge risk to the public from future changes to the relocated requirements. NNECO’s counsel acknowledged the possibility of future changes (indeed, that is the very basis for seeking the license amendment in the first place) and at least the theoretical possibility of undetectable incremental releases (in the spirit of the expression, “never say never”). The licensee explained, however, that any future changes would be subject to the new programmatic Technical Specifications establishing controls for proposed changes and to the existing regulations establishing effluent limits. The possibility that surveillance interval changes could lead to a failure to detect releases that are not within the normal operating limits is a very remote and speculative proposition. (Tr. 43-44).¹⁸

A conclusion that there must be a hearing on possible marginal health effects, somehow caused by speculative changes and the allegedly resulting incremental radiological releases, is simply unwarranted.¹⁹

¹⁸ In the dissenting opinion, the focus of the contention is redirected to the theoretical possibility of undetected releases in excess of regulatory limits. LBP-01-10, slip op. at 49, n. 16. However, a radiation monitor is, in a sense, a secondary tier of defense. Any future change in surveillance intervals for that equipment would not affect the liquid and gaseous waste management systems or the procedures used to control such releases within regulatory limits. For example, effluents are sampled for constituents and release rates prior to any release. A change in a surveillance interval for a normal operating release monitor also would not affect the cause or probability of an unintended release, nor would it affect the probability of accidental releases, accident mitigation equipment, or post-accident monitors intended to detect accidental releases.

¹⁹ As noted by the majority of the Licensing Board, LBP-01-10, slip op. at 17-18, n.8, there were protracted attempts during the prehearing conference call to develop evidence on future changes that have not even been identified, and the

Consistent with the Commissions regulations and policy on Technical Specifications improvement, the regulations and change processes that will apply to the REMODCM are more than adequate to assure no undue risk to public health and safety. The arguments of the Appellants and the dissent do not support a contention that the LCOs and SRs should remain in Technical Specifications. They also do not support the need for or appropriateness of either an open-ended inquiry into possible changes down the road or a generic inquiry into the health effects of low level radiation releases. The Licensing Board majority correctly concluded that these matters are outside the scope of this proceeding and do not support the Appellants' sole contention. The request for hearing and petition to intervene were properly denied.

B. The Petition Could Have Been Properly Denied Because the Appellants Do Not Have Standing to Intervene in this Proceeding

To intervene as a matter of right in a Commission licensing proceeding, Section 189a of the AEA, 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

impacts of those speculative changes. The exercise was as unnecessary as it was questionable from a procedural perspective. In their appeal, the Appellants now latch on to the scenario postulated by the dissent involving possible SR changes that would lead to a failure to detect releases that would not be the result of an accident, but would exceed Appendix I limits. Petition for Review, at 7-8. This is sheer speculation and there would be little point in litigating such an issue at this time — without any particular equipment change, LCO change, or SR change identified. Under the Commission's regulations, those are matters for evaluation under applicable change control requirements. If that safety evaluation determines that a license amendment is warranted, the necessary process will be followed. Moreover, as is clear from reading the contention as drafted, the focus of the contention as proposed was on normal, routine releases. (The Amended Petition, at 4, stated that "[t]he Petitioners are prepared to establish through expert testimony that any increase in routine radiological effluent ... will expose the public to ... adverse health effects.") Routine releases, by definition, are within regulatory limits.

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 the proceeding below, the Licensing Board found that "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." LBP-01-10, slip op. at 6. As discussed below, however, the Appellants in their minimal efforts to address the issue in both the Amended Petition and the Petition for Review, have failed to establish the standing of either CCAM or STAR with respect to the amendment at issue. Although not reached or relied upon by the Licensing Board majority, the Appellants' lack of a demonstration of standing is an independent basis to deny the appeal.

1. The Appellants Did Not Demonstrate Representational Standing Based Upon Potential Offsite Injuries to Members Traceable to the Amendment

To demonstrate an organization's representational standing, a petitioner must "identify at least one of its members by name and address and demonstrate how that member may be affected ... and show (preferably by affidavit) that the group is authorized to request a hearing on behalf of that member." *Northern States Power Co.* (Independent Spent Fuel Storage Installation), LBP-96-22, 44 NRC 138, 141 (1996). To derive standing from a member, the organization must demonstrate that the individual member has standing to participate, and has authorized the organization to represent his or her interests. *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating

Station, Unit 1), ALAB-535, 9 NRC 377, 390-96 (1979). The Amended Petition included the affidavit of Mr. Joseph H. Besade, which states that he resides approximately two miles from Millstone Station and that CCAM is authorized to represent him in this proceeding. The Amended Petition, however, initially contained no affidavit in support of STAR's claim of standing in this proceeding. On November 8, 2000, 12 days after the deadline set by the Licensing Board, and without any motion or showing of good cause, Appellants untimely filed the affidavit of STAR member Christine Guglielmo to attempt to establish STAR's representational standing based upon Ms. Guglielmo's standing.²⁰ Setting aside untimeliness, both CCAM and STAR therefore based their standing on claims of representational standing.

The Appellants have argued that representational standing would be based on the proximity of Mr. Besade's (CCAM) and Ms. Guglielmo's (STAR) residences to Millstone Station. The proffered affidavits claim that Mr. Besade's and Ms. Guglielmo's

²⁰ The requirements of 10 C.F.R. § 2.714(a)(3) allow an intervention petition to be amended at any time up to 15 days prior to the "special prehearing conference." Pursuant to 10 C.F.R. § 2.711, however, the Licensing Board is authorized to lengthen or shorten the times described in the NRC's regulations, and did so in this case. The Scheduling Order required the Appellants to submit their Amended Petition by October 27, 2000. Appellants did not even attempt to address, for STAR, any of the lateness factors of Section 2.714(a) with regard to the filing of the Guglielmo Affidavit. The Commission has held that a failure to address the Section 2.714(a) lateness factors is sufficient to reject a late-filed petition. See *Baltimore Gas and Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), LBP-98-26, 48 NRC 232, 241 (1998) (petition rejected for failure to address Section 2.714(a) lateness factors); *Houston Lighting and Power Co., et al.* (South Texas Project Units 1 and 2), LBP-85-42, 22 NRC 795, 801 (1985) (late-filed contention could be rejected for not addressing 2.714(a) lateness factors); and *Boston Edison Co.* (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 465-66 (1985) (Atomic Safety and Licensing Appeal Board affirms Licensing Board finding that petition to intervene was correctly denied because it failed to address the Section 2.714(a) lateness factors).

residences are two miles and 20 miles from Millstone Station, respectively. Where representational standing is based on nearby residence, however, the Commission has held that petitioners must allege an "obvious potential for offsite consequences" resulting *from the amendment at issue*. *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989).²¹ Both CCAM and STAR utterly failed to establish standing based on potential offsite consequences from the amendment at issue. Nowhere in its filings did the Appellants ever attempt to directly establish the "obvious potential for offsite consequences," as they are required to do with particularity. *Cf. Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72-74 (1994) (focusing on whether alleged injury is "concrete and particularized" and whether there is a "realistic threat" of a direct injury). Discussions on the prehearing conference call were directed at such a showing, but were late and were inadequate.

As an essential element of standing, an alleged potential injury must be fairly traced to the challenged action. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996); *Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995); *Cleveland Elec. Illuminating Co.* (Perry Nuclear

²¹ The proposed contention (as reiterated in the Petition for Review, at 4) referred to alleged increases in "individual and cumulative occupational radiation exposures." To the extent the Appellants would rely on such alleged injuries, they would need to establish that the organizations represent *plant workers*. There was no such suggestion in the Amended Petition and, therefore, the Appellants could not have standing to intervene based on worker safety. *Compare Yankee Atomic Electric Company* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 70 n.4 (1996) (finding standing to intervene on matters related to injuries to the public, but not with respect to matters involving worker occupational radiation exposure).

Power Plant), CLI-93-21, 38 NRC 87, 92 (1993) (hereinafter "*Perry I*"). As already discussed above, the amendment at issue in this proceeding moves LCOs and SRs related to the radiological monitoring program, verbatim, from the Technical Specifications to the REMODCM. The amendment itself does not involve equipment changes or operational changes that could give rise to the potential for offsite consequences. Likewise, the amendment does not change normal operational radiological effluent limits. Therefore no offsite radiological harm can follow from the amendment. To the extent that CCAM and STAR alleged — following the lead of the dissent — potential offsite injuries due to *future* plant changes, those hypothetical future changes are not within the scope of the *present* proceeding. As was already discussed above in connection with the proposed contention, those speculative future changes will be subject to the change control procedures applicable at the time. Moreover, even if one could postulate remote possibilities of injuries that could result from future surveillance/monitoring changes, those injuries would not be the result of the present amendment, but of the future change.

The dissenting member of the Licensing Board specifically cites to the Appellants' claim in the Amended Petition that "[s]hould the amendment 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" LBP-01-10, at 31, 32. As with the proposed contention, the dissent strived to identify potential surveillance changes that might one day "cause" incremental releases of radiation — releases that might somehow exceed NRC allowances and that might somehow cause harm. The line of inquiry, however, is unnecessary. Any injuries

“caused” by future changes cannot be traced to this amendment. The Appellants never demonstrated any link between *the amendment itself* and increased radiological exposure. Therefore, the claims of representational standing based on the mere proximity of members’ residences to Millstone Station must fail.

2. The Appellants’ Claim of Standing Based On a Loss of Hearing Rights Also Lacks Merit

In addressing the standing issue, the dissenting member of the Licensing Board — at least as a threshold determination — focused on the Appellants’ claim that the proposed amendments will deprive the members of CCAM and STAR of the opportunity for hearing and comment on future changes to radiological monitoring or effluent requirements. LBP-01-10, slip op. at 39-41. Citing *Perry I*, CLI-93-21, 38 NRC 87 (1993), the dissent found that the asserted loss of procedural rights “relates to a potential substantive injury — radiological harm to them as resident in the plant’s vicinity” (*id.* at 41), and that this was a sufficient basis for standing.

Perry I concerned the license amendment discussed above to delete the reactor vessel material surveillance program withdrawal schedule from the plant’s Technical Specifications and transfer it to the updated safety analysis report. The Licensing Board in that proceeding had denied the petition for leave to intervene and for a hearing, finding that the petitioners there had failed to allege sufficient interest in the proceeding, as required by 10 C.F.R. § 2.714(a)(1). *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), LBP-92-4, 35 NRC 114, 116 (1992). The Commission reversed, holding that the threshold standing requirements were indeed satisfied by the alleged “loss of the rights to notice, opportunity for a hearing, and

opportunity for judicial review” *Perry I*, CLI-93-21, 38 NRC at 93. The Commission held that “[s]tanding may be based upon the alleged loss of a procedural right ‘so long as the procedures in question are designed to protect some threatened concrete interest’ that is the ultimate basis of the individual’s standing.” *Id.* at 94 (citing *Lujan*, 112 S.Ct. at 2143, n.8). *Perry I*, therefore, stands for the proposition that, if a license amendment could create procedural harm, standing could be based on that claim — but only if the procedure would in turn protect “some threatened concrete interest.” As recognized by the dissenting judge, the decision in *Perry I* alone does not compel a finding of standing in this case. There must still be a finding of a concrete interest (*i.e.*, an offsite injury) that would result from the amendment and the alleged procedural harm.

In *Perry I* the Commission explicitly concluded that the procedural right in that case might protect a concrete interest: “the surveillance of the Perry reactor vessel might become lax and prevent detection of a weakened reactor vessel, and ultimately result in an accidental release of fission products into the environment if the vessel should fail.” *Id.* In the present case, for all of the reasons already discussed, there is no link between unspecified, hypothetical future changes and concrete *offsite* harm. The RETS do not govern the liquid and gaseous radiological effluent management systems at Millstone or the procedures used for controlling releases within regulatory limits. Radiological releases in the future, as before the amendment, will be subject to the regulatory radiological effluent limits (*e.g.*, 10 C.F.R. Part 20 and Part 50, Appendix I). The RETS relate to monitors that do not, in themselves, cause radiological releases. The

LCOs and SRs for monitoring equipment cannot be equated to SRs for the reactor vessel materials (and ultimately the vessel itself) as in *Perry I*.²²

The Commission should also consider the ultimate decision in the *Perry* case (i.e., in *Perry II*). As discussed above in the context of the proposed contention, Appellants have failed to show any legal basis for the claim of a loss of notice, comment, and hearing rights with respect to future changes. For such a harm to exist, there would need to be a claim that the requirements at issue must be in Technical Specifications in the first place. As in *Perry II*, the Appellants did not articulate or establish such a claim. Therefore, the legal harm alleged cannot be redressed in this proceeding any more than it was in *Perry II*. The request for hearing and petition to intervene could have been properly denied for lack of an adequate basis for Appellants' standing.


²²

Moreover, radiological monitoring equipment at Millstone (and most other nuclear plants) was, prior to the amendment, subject to 10 C.F.R. § 50.59. Accordingly, even without the amendment, certain equipment changes could be made, subject to the RETS, without prior NRC approval, notice, and opportunity for hearing. While RETS established operability requirements, SRs, and action statements, equipment or operational changes within these requirements could be made under Section 50.59. The Appellants erroneously pre-suppose a hearing right on all changes to monitoring equipment. The Appellants' entire argument — that the amendment "deprives" them of a hearing opportunity on equipment changes — is unfounded because that opportunity did not necessarily exist.

V. CONCLUSION

For the reasons articulated by the Licensing Board majority and for the reasons above, the Licensing Board's decision in LBP-01-10 should be upheld.

Respectfully submitted,

A handwritten signature in black ink that reads "David A. Repka". The signature is fluid and cursive, with a long horizontal line extending to the right.

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Dated in Washington, D.C.
this 23rd day of April 2001

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:)	
)	
Dominion Nuclear Connecticut, Inc.)	Docket Nos. 50-336
)	50-423
(Millstone Nuclear Power Station,)	
Units 2 and 3))	

CERTIFICATE OF SERVICE

I hereby certify that copies of "DOMINION NUCLEAR CONNECTICUT, INC.'S BRIEF IN OPPOSITION TO APPEAL BY CONNECTICUT COALITION AGAINST MILLSTONE AND STAR FOUNDATION OF LBP-01-10" in the captioned proceeding, have been served on the following by deposit in the United States mail, first class, this 23rd day of April 2001. Additional e-mail service has been made this same day as shown below.

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