

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of)
)
)

DOMINION NUCLEAR)
CONNECTICUT INC.)
(Millstone Nuclear Power Station,)
Units 2 and 3))

)

Docket Nos. 50-336-LA
50-423-LA

CLI-01-24

MEMORANDUM AND ORDER**I. Introduction**

Today we review an Atomic Safety and Licensing Board decision, LBP-01-10, 53 NRC 273 (2001), that denied a petition for leave to intervene and request for hearing filed by the Connecticut Coalition Against Millstone and the STAR ("Standing for Truth About Radiation") Foundation. The petitioners seek to challenge two related license amendments -- one for Unit 2 and the other for Unit 3 -- which remove some procedural details from the Millstone technical specifications and relocate them in the Millstone Radiological Effluent Monitoring and Offsite Dose Calculation Manual (REMDCM). The Board found the petitioners' sole contention inadmissible, and thus denied the petition for intervention. Pursuant to 10 C.F.R. § 2.714a, the

petitioners have appealed the Board's decision.¹ Dominion Nuclear Connecticut, Inc. (DNC)² and the NRC staff support the decision. For the reasons we give below, we affirm.

II. Background

This proceeding arises from a license amendment application that NNECO submitted to the NRC on February 22, 2000. Issued November 28, 2000, the license amendments transfer certain details from the licensee's technical specifications -- specifically, its Radiological Effluent Technical Specifications (RETS)) -- to a licensee-controlled document, the REMODCM.

The transfer of items from technical specifications to licensee-controlled documents is part of an NRC-initiated program to improve technical specifications at all nuclear power reactors. Because the amendments in this proceeding stem directly from this program, the Commission believes it would be helpful, at the outset, to outline the general NRC effort to improve technical specifications and to focus them on the most critical safety details. We then turn to the particular license amendments and contention at issue in this case.

¹ The petitioners filed their appeal under 10 C.F.R. § 2.786. However, because this is an appeal from a decision wholly denying a petition for leave to intervene, the appropriate regulation is 10 C.F.R. § 2.714a. We, therefore, treat the appeal as if it were filed under the appropriate regulation.

² When this proceeding began, the licensee for Millstone Units 2 and 3 was Northeast Nuclear Energy Company (NNECO). In March 2001, the NRC issued an order approving a request to transfer the operating licenses for Millstone Units 2 and 3 from NNECO and certain co-licensee owners to DNC. See 66 Fed. Reg. 15,911. Conforming license amendments were issued on March 31, 2001. See 66 Fed. Reg. 20,016. Accordingly, the new operator licensee - and party in this proceeding -- is DNC. The petitioners indicate in their appeal brief that they are challenging in state court the legitimacy of the transfer of operating authority to DNC. Their judicial challenge involves non-radiological matters raised under the Clean Water Act and do not bear directly on the radiological effluent issues raised in this proceeding.

1. Technical Specifications and the NRC's Policy to Improve Them

Under the Atomic Energy Act (AEA), every license to operate a production or utilization facility must contain a list of technical specifications necessary for adequate protection of public health and safety. See 42 U.S.C. § 2232. Technical specifications must include information on the amount, kind, and source of special nuclear material, the place of use, and the particular characteristics of the facility. Id. The AEA, however, leaves it up to the Commission to determine, and prescribe by rule or regulation, what additional information should be included in technical specifications to ensure public health and safety and the common defense and security.

In 1968, the NRC promulgated 10 C.F.R. § 50.36, a rule outlining the required contents of technical specifications. See 33 Fed. Reg. 18,610 (Dec. 17, 1968). As originally issued, however, § 50.36 lacked “well-defined criteria.” Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315, 318 (1996)(citing “Final Policy Statement on Technical Specifications Improvements for Nuclear Power Reactors,” 58 Fed. Reg. 39,132, 39,132 (July 22, 1993)). This caused the number of items included in technical specifications to “mushroom[] after the rule was issued.” Perry, 44 NRC at 318. Over time, technical specifications “essentially came to include all ‘Commission requirements governing the operations of nuclear power reactors.’” Id. (citing Policy Statement, 58 Fed. Reg. at 39,133).

As a result, the NRC staff attempted to rid technical specifications of excessive detail and confine them to the most safety-significant matters:

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. The project resulted in a policy to limit technical specifications to those items deemed most important to safety.

Perry, 44 NRC at 318 (citations omitted).

As part of its technical specifications initiative, the NRC revised § 50.36, which now identifies criteria to be used in determining what items must be included in technical specifications. See 10 C.F.R. § 50.36. If a procedural or other requirement meets any one of the criteria, it must be retained in the technical specifications. Id. Technical specifications that do not meet any of the criteria may be transferred to licensee-controlled documents. See generally Technical Specifications, Final Rule, 60 Fed. Reg. 36,953 (July 19, 1995). Licensees are encouraged to “voluntarily use the criteria to relocate existing technical specifications that do not meet any of the criteria.” Id. at 36,958. Thus, the agency policy is to prune technical specifications of voluminous details that are relatively less significant, and thereby “focus licensee and plant operator attention” on the most significant technical concerns. See Policy Statement, 58 Fed. Reg. at 39,135.

As part of the policy to streamline technical specifications, the NRC staff over the past several years has been identifying what kinds of items can be removed -- without adverse consequences for adequate assurance of safety -- from the standard technical specifications. NRC “generic letters,” issued to licensees industry-wide, have identified particular items deemed amenable to removal from the technical specifications.

2. The License Amendments

The license amendments in this proceeding stem from Generic Letter 89-01, which advised all power reactor licensees and applicants that “the procedural details ... on radioactive effluents and radiological environmental monitoring can be relocated to the Offsite Dose

Calculation Manual.”³ The letter enumerates specific radiological effluent technical specifications that licensees may choose to relocate. Pursuant to Generic Letter 89-01, the license amendments at issue here eliminate from the technical specifications numerous detailed procedures for monitoring routine radioactive releases. The challenged amendments transfer these procedural details to the Millstone REMODCM.

Licensees must adhere to a number of regulatory limits upon effluent releases. Various procedures and instruments enable licensees to sample the concentration levels of radioactive effluents and to monitor the release rate of routine, low-level releases of gaseous and liquid effluents. Part of this surveillance program consists of low-level radiation monitors set up to initiate an automatic alarm that can alert the licensee well before an effluent release might exceed an applicable radiological limit. In addition to an alarm, many of these monitors also have an automatic trip function that will terminate the effluent release before it exceeds applicable regulatory limits. A host of detailed procedural requirements govern how frequently these monitors should be checked, tested, or calibrated, and what measures should be taken when one or more of them might be inoperable. Such detailed procedures are among the items which the license amendments in this proceeding relocate.

It bears noting, however, that these license amendments involve only the monitoring of common releases of low-level radioactive effluent releases. All nuclear power plants routinely release low-level concentrations of radioactive materials in their gaseous and liquid effluents. The instruments and procedures for monitoring low-level releases are not intended to stop or mitigate reactor accidents. Low-level monitors are designed to operate only within a specific low range of radioactive material concentrations associated with routine operations, and not to

³ Generic Letter 89-01, “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” (Jan. 31, 1989) at 1.

monitor the elevated levels of radioactive materials that would be expected in a reactor accident. Licensees have other, so-called “mid-range” or “high-range” radiation monitors that monitor the elevated levels of materials that would occur in the event of a serious accident. Thus, nuclear power plants have separate instruments and procedures for tracking those effluent releases associated with accidents and those involving merely routine operations. The license amendments at issue here bear only upon the latter.

While the license amendments at issue here transfer certain procedural requirements from the technical specifications to the REMODCM, they neither change nor abolish any of these requirements. In other words, the amendments do not themselves alter any effluent monitoring instrumentation or procedures. Nor is the licensee’s obligation to follow these monitoring procedures in the least diminished by the transfer of procedures to the REMODCM. Just as licensees must comply with the requirements listed in technical specifications, they also must comply with the commitments specified in licensee-controlled documents, such as the REMODCM. The NRC staff oversees compliance with such documents.

The practical effect of the amendments, however, is that the licensee in the future can make changes to the transferred effluent monitoring procedures without a license amendment. Because technical specifications are part of an operating license, any change to them requires a license amendment. In contrast, the REMODCM typically can be adjusted without a license amendment.⁴

A licensee is not free to alter its REMODCM indiscriminately, however. Although the licensee need not obtain prior NRC approval, the licensee must justify and report any change in the procedures listed in the REMODCM. The NRC staff is then in a position to verify that the

⁴ There are applicable control requirements governing changes to an REMODCM, found under both Section 6 of the Technical Specifications and 10 C.F.R. § 50.59. These could require a change to the REMODCM to be accompanied by a license amendment, in which case there would be public notice and opportunity for a hearing.

procedures conform to NRC regulations and standards on effluent surveillance. More importantly, though, altering REMODCM procedures has no impact on the NRC's substantive regulatory requirements governing radioactive effluents and radiological environmental monitoring, found in 10 C.F.R. Part 20 and Appendix I to 10 C.F.R. Part 50. See also 40 C.F.R. § 190. Regardless of any potential modification of procedures listed in the REMODCM, existing limits on the concentration of radioactive material that can be released in effluents remain the same, as do limits on the rate of effluent release -- "dose rate" -- and all applicable offsite public dose limits. See, e.g. Table 2 of Appendix B to Part 20 (regarding concentration); see also 10 C.F.R. Part 50, Appendix I (design criteria for equipment to process and maintain radioactive effluent releases as low as is reasonably achievable (ALARA)); 10 C.F.R. § 20.1302; 10 C.F.R. § 20.1501 (requirement to demonstrate the accuracy of surveys of effluent concentrations and offsite dose levels, to assure compliance with applicable dose limits).⁵ In fact, all licensees are specifically required to include and maintain technical specifications governing the release of radioactive materials during normal operations so as to assure that any releases not only comply with § 20.1301, but also with the obligation to keep releases as low as is reasonably achievable. See 10 C.F.R. § 50.36a(a). In addition, each licensee is required to submit a report to the Commission annually that specifies the quantity of principal radionuclides released to the unrestricted areas in liquid and gaseous effluents during the

⁵ Generic Letter 89-01 thus states that the relocation of effluent monitoring procedures is intended to improve technical specifications, but not to "reduce the level of radiological effluent control." See Generic Letter 89-01 at 1. Numerous details do not warrant inclusion in the technical specifications, the letter explains, because they already would be addressed and covered by programmatic controls in the technical specifications. These programmatic controls constitute extensive overall parameters and limitations on gaseous and liquid effluent releases. See, e.g., Technical Specifications 6.20 for Unit 2. Many requirements found in the programmatic controls indeed add to or otherwise exceed those found in our regulations. The petitioners, we note, have not raised any claim challenging the adequacy of the programmatic technical specifications.

previous 12 months. Id. at § 50.36a(a)(2). This report is a public document. See 10 C.F.R. § 2.790.

In short, by transferring procedural details out of the technical specifications, the licensee in the future may make adjustments to particular effluent monitoring procedures without a license amendment. But all public dose limits for liquid and gaseous effluent continue unchanged. Thus, licensees are not free to make any adjustment in monitoring procedures that reasonably could lead to a violation of radiological effluent limits or related surveillance requirements.

As a routine matter, the NRC staff checks the adequacy of procedures outlined in a licensee's REMODCM, and also verifies whether the listed procedures have been followed. In addition, the NRC staff may examine a licensee's calculation of monitor "setpoints." Setpoints establish the level of radioactivity at which a monitor will sound an alarm or at which an effluent release will be terminated. Before the Licensing Board, there seemingly was much confusion over setpoints. See Transcript at 101-06. Closely read, however, the transcript indicates that the license amendments at issue here do not affect the licensee's ability to adjust a monitor's setpoint. See id. at 104-05. None of the technical specifications being transferred to the REMODCM specifies particular setpoints.⁶

⁶ Setpoints typically are calculated and vary release-by-release. Thus, by their nature, they are generally unsuitable for fixing in technical specifications. Licensees need the flexibility to adjust monitor setpoints to account for variations in background radiation, and differences in the types and quantities of radioactive materials among separate batches of effluent. Setpoint calculations are based upon administrative and regulatory dose limits, and take into account both radioactive effluent releases to date and projected dose contributions. Typical effluent releases constitute merely a very small fraction of regulatory dose limits. Licensees establish these low setpoints to conform with ALARA obligations under Appendix I to Part 50. See generally NRC Regulatory Guide 1.21, "Measuring, Evaluating, and Reporting Radioactivity in Solid Wastes and Releases of Radioactive Materials in Liquid and Gaseous Effluents from Light-Water-Cooled Nuclear Power Plants," Rev. 1 (June 1974)(referencing American National Standards Institute (ANSI) standard 13.10). In addition, all monitors will also have an absolute high alarm setpoint consistent with the 10 C.F.R. Part 20 public dose limit of 100 millirem.

It is possible that a licensee may calculate an inappropriate setpoint for a particular batch release, but that was also true prior to the contested license amendments. Even before these license amendments the licensee already had the authority to adjust monitor setpoints as needed. The license amendments give the licensee no greater authority or flexibility to adjust setpoints.

3. The Petitioners and Their Contention

Connecticut Coalition Against Millstone (CCAM) and the STAR Foundation jointly petitioned for a hearing on the Millstone license amendment. CCAM, based in Mystic Connecticut, is an organization which “advocate[s] for safe and renewable energy sources and environmental protection.” See Amended Petition (Oct. 27, 2000) at 2. According to the intervention petition, several members of the organization reside within five miles of the Millstone facility. The organization attached the affidavit of Joseph H. Besade, who affirms that his home is within two miles of Millstone. The STAR Foundation is a non-profit organization based in East Hampton, New York. The petition states that the foundation’s membership includes families that own property and reside within the Millstone 10-mile emergency evacuation zone.

The petitioners claim that because of the license amendments 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.” See id. at 2. Their sole contention states that “‘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 petitioners] of notice of proposed changes to the Millstone radiological liquid and gaseous effluent monitoring instrumentation.” Id. at 3.

The petitioners say that the contested amendments eliminate the opportunity for a hearing “to comment and object to changes” -- changes that, the contention alleges, “can only be projected to lower standards of radiological effluent monitoring in the era of deregulation and electric restructuring.” Id. The petitioners argue that the license amendments create a greater risk of radiation exposures to the public:

[A]s 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.

Id. at 4.

4. The Licensing Board’s Decision

To intervene in an NRC licensing proceeding, a prospective intervenor must allege sufficient “interest” in the proposed licensing action, and describe “how that interest may be affected by the results of the proceeding.” See 10 C.F.R. § 2.714(a)(2). In other words, the petitioner must have “standing” to intervene.⁷ In addition, a petitioner for intervention must proffer at least one admissible contention for litigation. 10 C.F.R. § 2.714(b). Both the licensee and the NRC staff opposed the intervention petition here on two grounds: lack of standing and failure to submit an admissible contention.

The Licensing Board’s 2-1 decision held that the petitioners had not submitted an admissible contention. Finding no contention, the majority never reached the question of the

⁷ For standing, a petitioner must allege (1) a particularized “injury in fact,” (2) that is fairly traceable to the action being challenged and (3) likely to be redressed by a favorable decision. Quivira Mining Co. (Ambrosia Lake Facility, Grants, New Mexico) CLI-98-11, 48 NRC 1, 5-6 (1998); see Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998).

petitioners' standing to intervene. In rejecting the contention, the majority emphasized that the petitioners had failed to articulate any substantive reason why the radiological effluent procedural details needed to remain in the technical specifications. If these items do not need to be located in the technical specifications, the majority reasoned, then the petitioners are not entitled as a matter of right to future notice and opportunity for hearing on all potential changes to the low-level radiological effluent monitoring program at Millstone:

The petitioners' contention ... 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.*

53 NRC at 282 (emphasis added). "[T]here is no general right to a hearing for a hearing's sake," the majority stressed. *Id.* Petitioners only have a "right" to a hearing on future changes to radiological effluent procedures if these procedures are required, by statute or regulation, to be included in the technical specifications, the majority found. *See id.* In the majority's view, the petitioners' contention did not adequately specify why these effluent procedures needed to remain in the technical specifications.

Disagreeing with the majority, a lengthy dissenting opinion found that the petitioners had in fact provided a sufficient -- albeit "minimal" -- argument on the need to maintain radiological effluent procedures in the Millstone technical specifications. *See generally* 53 NRC at 300-13. The dissent also evaluated the petitioners' standing and concluded that petitioner CCAM had demonstrated standing on behalf of its members.⁸

⁸ In a footnote, the dissent noted that petitioner STAR had been late in submitting an affidavit by one of its members and that "no good cause" had been shown for the late filing.

On appeal to the Commission, the petitioners argue that their contention should have been admitted. The NRC Staff and DNC support the Board's decision. We affirm, on the grounds we provide below.

III. Analysis

Below we first review our requirements and standards for admitting contentions into our proceedings. We then address the admissibility of the petitioners' contention in this case.

1. Contention Standards

To be admissible, a contention must specify the particular issue of law or fact the petitioner is raising, and contain: (1) a brief explanation of the bases of the contention; and (2) a concise statement of the alleged facts or expert opinion that support the contention and upon which the petitioner will rely in proving the contention at the hearing. See 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)(quotations and citations omitted).

Additionally, a contention must show that a "genuine dispute" exists with the Applicant on a material issue of law or fact. 10 C.F.R. § 2.714(b)(2)(iii). The intervenor must do more than submit "bald or conclusory allegation[s]" of a dispute with the applicant. See "Final Rule, Rules of Practice for Domestic Licensing Proceedings -- Procedural Changes in the Hearing Process," 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989). He or she must "read the pertinent

The dissent indicated that it would, therefore, be inclined to rule against the admission of STAR if this proceeding continued further. See 53 NRC at 296 n.14.

portions of the license application, including the Safety Analysis Report and the Environmental Report, state the applicant's position and the petitioner's opposing view." Id. at 33,170.

Our contention rule is strict by design. The Commission toughened it in 1989 because in prior years "licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation." Oconee, 49 NRC at 334. "Admitted intervenors often had negligible knowledge of nuclear power issues and, in fact, no direct case to present, but instead attempted to unearth a case through cross-examination." Id. (citing "Proposed Rule, Contentions, 51 Fed. Reg. 24,365, 24,366 (July 3, 1986)). Serious hearing delays -- of months or years -- occurred, as Licensing Boards admitted and then sifted through poorly defined or supported contentions. See id. Congress thus called upon the Commission to make "fundamental changes" in the public hearing process. Id. (citing H.R. Rep. No. 97-177, at 151 (1981)).

The Commission responded with the 1989 contention rule revisions, which insist upon some "reasonably specific factual and legal" basis for the contention. See id.; see also Final Rule, 54 Fed. Reg. at 33,171. Under the rule, presiding officers may not admit open-ended or ill-defined contentions lacking in specificity or basis. See 10 C.F.R. § 2.714(b); see generally Final Rule, 54 Fed. Reg. 33,168. Petitioners "must articulate at the outset the specific issues they wish to litigate as a prerequisite to gaining formal admission as parties." Oconee, 49 NRC at 388. See also Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 22 (1998).

2. Arguments on Appeal

We turn now to the petitioners' claims on appeal. Because the contested license amendments themselves make no change in any monitoring procedures, the petitioners rely

here, as they did before the Licensing Board, on their loss of future opportunities to challenge -- by adjudicatory intervention -- licensee-initiated changes in low-level effluent monitoring details. See "Connecticut Coalition Against Millstone and STAR Foundation Petition for Review of LBP-01-10 (Apr. 9, 2001)(Appeal Brief) at 4. The petitioners suggest that without full public participation effluent monitoring "may become unduly lax" and "fail[] to pick up [a] release." Id. at 7. Thus, allegedly there could be "a relatively minor accidental or other failure of equipment, accompanied by a failure to detect and correct as quickly the increased release." Id. at 8 (quoting dissent, 53 NRC at 296).

The petitioners' claims, however, amount to no more than a speculative chain of events leading to potential injury; i.e., if the license amendments issue, then hearing opportunities will diminish, lax monitoring will ensue, and the risk of avoidable radiation releases will increase. What the contention lacks, however, is the necessary minimal factual or legal basis for believing that removal of the technical specifications at issue here would significantly increase the public health and safety risk. While it is debatable whether the petitioners' allegations of lost hearing opportunities suffice for standing to intervene, an issue we do not decide, the allegations surely fall short of an admissible contention, for they fail to offer any specific explanation, factual or legal, for why the consequences they fear will occur if these particular technical specifications are transferred to the REMODCM. Indeed, the petitioners' pleadings evince little familiarity with the actual technical specifications at issue here, or, for that matter, with nuclear power plant effluent monitoring practices and requirements generally.

In short, in seeking to maintain low-level effluent monitoring procedures in the Millstone technical specifications, the petitioners may not simply complain generally of lost hearing opportunities causing future safety risks. An admissible contention must explain, with specificity, particular safety or legal reasons requiring rejection of the contested license

amendments. As the Board majority emphasized, “there is no general right to a hearing for a hearing’s sake.” 53 NRC at 282. The petitioners do not have a “right” to intervene in possible future changes to effluent monitoring details if no safety or legal reason compels their retention in the Millstone license.

The petitioners have not provided the necessary minimal factual or legal basis to suggest that either (a) the effluent monitoring procedures at issue are of such safety significance that technical specifications must continue to include them, or (b) that this licensee in particular --because, for example, of particular license conditions or deficiencies in its effluent monitoring program -- should be required to retain the effluent procedures in its license. We address these points in detail below.

a. Effluent Monitoring Procedures and the Technical Specifications

It is certainly the case that almost every item originally contained in technical specifications has some conceivable connection to safety. It follows, then, that for every Generic Letter the NRC has issued to licensees recommending that a particular set of specifications be relocated to a licensee-controlled document, one could make a theoretical argument that safety might be diminished because these items in the future could be changed without the additional oversight and controls provided by a license amendment. But this general premise is insufficient, by itself, as a ground for intervention.

Simply because a set of procedural items was commonly inserted in technical specifications in the past does not mean that they must remain there. There is “no statutory or regulatory requirement that every operational detail ... be subject to a technical specification.” Perry, 44 NRC at 328. Not all licensee actions or changes in procedures must carry with them an opportunity for public hearing. See generally id. at 326-29. The petitioners’ theory

essentially means that no item could ever be transferred from the technical specifications because one could always argue that there is a potential, however remote, of a greater possibility of injury if the item in the future can be changed without a full license amendment.

This extreme view would undercut the Commission's entire technical specifications improvement program -- which we describe in some detail above. Our agency has already determined, as a policy matter, that many requirements originally contained in technical specifications can and should be transferred to licensee-controlled documents. Leaner technical specifications, the Commission believes, more effectively "focus licensee and plant operator attention on those plant conditions most important to safety." See Policy Statement, 58 Fed. Reg. at 39,135. Indeed, the former licensee practice of including all manner of Commission requirements in the technical specifications noticeably "resulted in an adverse ... impact on safety" by diverting NRC staff and licensee attention from the more important requirements. See Final Rule, 60 Fed. Reg. at 36,957.

Technical specifications, therefore, should be reserved for those reactor operation "conditions or limitations ... necessary to obviate the possibility of an abnormal situation or event giving rise to an immediate threat to the public health and safety." Id. (citing Portland General Elec. Co., ALAB-531, 9 NRC 263 (1979)). A Commission rule, 10 C.F.R. § 50.36, delineates the kinds of requirements that are of "such controlling importance to safety" that they must remain in the technical specifications.⁹ When the staff determines under § 50.36 that particular requirements can be transferred out of the technical specifications, it is not deciding that these items have no safety significance whatsoever, but only that they do not fall among those limits and parameters most immediately significant for the protection of public health and safety. Thus, they can be adequately followed, monitored, and enforced by means of licensee-

⁹ Additional requirements for technical specifications on effluents are found in 10 C.F.R. § 50.36a.

controlled documents. By reducing the total number of technical specifications, the Commission's policy also aims to reduce license amendment requests and thereby avoid unnecessarily taxing the resources of the NRC and licensees, while at the same time assuring that technical specifications focus on the most safety-critical features, posing the greatest immediate threats to public health and safety.

This license amendment proceeding offers the petitioners the opportunity to come forward and state why the nature of these effluent procedures at issue here is such that they should not be removed from the technical specifications. The petitioners have not done so. Nowhere, for instance, in either their Amended Petition or their appeal brief do the petitioners even refer to the § 50.36 criteria that govern which technical specifications must be retained and which can be relocated to licensee-controlled documents. The license application, in some detail, applies these criteria to the proposed changes to conclude that the procedural details relocated by these license amendments can be taken out of the technical specifications. The petitioners do not even attempt to rebut the licensee's analyses. Our contention-pleading rule, however, calls on intervention petitioners "to include references to the specific portion of the application ... that the petitioner disputes and the supporting reasons for each dispute." See 10 C.F.R. § 2.714(b)(2)(iii).

It is true, as the dissent below and the petitioners point out, that the contention rule does not require "a specific allegation or citation of a regulatory violation." See Appeal Brief at 6 (referencing dissent). Thus, contrary to what the Board majority implied (53 NRC at 282-83), the petitioners had no legal obligation to cite or discuss § 50.36 or any other substantive rule. But the petitioners were obliged to give the "supporting reasons" for keeping effluent requirements in the license. See 10 C.F.R. § 2.714(b)(iii). And it was the petitioners themselves who argued below that "the provisions that presently appear in the technical

specifications belong there.” See Transcript at 25. It would be reasonable to expect, therefore, that the petitioners would address in their briefs the agency’s § 50.36 standards for technical specifications and the licensee’s application of them. See Transcript at 25.

The first and only time the petitioners mentioned § 50.36 was during a telephone prehearing conference when, in response to questioning, petitioners’ counsel simply said: “[w]e do argue that these technical specifications belong and should remain in the license...specifically 10 C.F.R. § 50.36, does seem to speak directly to this.” Id. at 26. Petitioners’ counsel went on to suggest that specifically 10 C.F.R. § 50.36(c)(1)(ii)(A), involving “safety system settings,” prohibits the removal of the effluent monitoring procedures from the technical specifications. She further stated that this argument was “implicit” in the petitioners’ Amended Petition. Id. at 56.

The Board’s majority decision rejects the notion that the intervention petition implicitly included a § 50.36 claim. We agree. The Amended Petition contains not the slightest reference to any particular item in § 50.36, and certainly no mention of § 50.36(c)(1)(ii)(A), or any requirements or language associated with that rule. Moreover, the majority found § 50.36(c)(1)(ii)(A) entirely inapplicable to the effluent monitoring at issue in this proceeding. The petitioners do not contest this finding on appeal, and indeed apparently have dropped altogether any § 50.36-related argument. The appeal does not mention § 50.36, or even any of the considerations that govern whether a matter should be included in the technical specifications.

That leaves the petitioners without any apparent foundation for their challenge to removal of the contested technical specifications from the Millstone license. Yet, as we have stressed, a contention alleging that an application is deficient must identify “each failure and the supporting reasons for the petitioner’s belief.” 10 C.F.R. § 2.714(b)(2)(iii). Full adjudicatory

hearings should be “triggered only by those able to proffer at least some minimal factual and legal foundation in support of their contentions.” Oconee, 49 NRC at 334.¹⁰ The petitioners’ general references to lost hearing opportunities and lax monitoring in the future do not meet this standard.

b) Generalized allegations about the licensee

The petitioners’ various efforts on appeal to overcome their failure to identify a specific illegality or safety flaw in the license amendment application are highly generalized and do not come close to meeting our contention rule. For instance, it is simply not enough to allege generally that the licensee will “lower standards of radiological effluent monitoring” because we are in an “era of deregulation and electric restructuring.” See Appeal Brief at 4. Nor can we infer any nefarious intent behind the licensee’s statement that transferring effluent requirements

¹⁰ Of some note is a similar proceeding, Perry, 44 NRC 315, which also involved the transfer of specific items -- the material specimen withdrawal schedule -- from the technical specifications to a licensee-controlled document. In that case, though, any future changes to the withdrawal schedule would continue to require prior staff approval. The petitioners in Perry therefore claimed that this prior staff approval process was equivalent to the license amendment process, and that any future changes to the withdrawal schedule would represent de facto license amendments, requiring notice and hearing opportunities under § 189a of the Atomic Energy Act -- a claim ultimately rejected by the Commission. See Perry, CLI-96-13, 44 NRC 315 (1996). Here, the petitioners have not argued that future adjustments to effluent monitoring details would constitute de facto license amendments.

Entirely on its own, however, the dissent below intimates that future changes to effluent monitoring procedures might “supplement the existing operating authority” of the licensee, and thus might in effect reflect de facto license amendments. See 53 NRC at 308-09. The dissent’s theory does not revive the petitioners’ contention. For one thing, it is a “contention’s proponent, not the licensing board, [that] is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions.” Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC at 22. Moreover, because the license amendments do not in any fashion accord the licensee authority to exceed current limits on radiological effluent rate of release, concentration, or public dose, they cannot be said to “supplement” the licensee’s operating authority in a meaningful sense. Providing flexibility on how to achieve regulatory requirements is not akin to relaxing requirements.

to the REMODCM “will reduce costs” by eliminating the necessity to always obtain a license amendment for any changes. See id. at 3 (citing NNECO’s cover letter accompanying the license application). Cost reduction is one of the goals of improving technical specifications, but it is a stretch, to say the least, to conclude without more that “[c]ost-cutting and ... ineffective radiation monitoring go hand-in-hand.” Id. at 8.

In addition, the contention states that the “amendment request is particularly objectionable in light of the levels of radiological effluent released to the environment by the Millstone reactors.” Id. at 4. It is unclear, however, what “levels” the petitioners mean. When asked by the Board in a prehearing conference call whether any such releases violated agency regulations, the petitioners’ counsel said merely that she did not know. See Transcript at 24. An affidavit submitted by the petitioners’ expert makes similar unspecific references to “excessive” releases. Our contention rule does not permit “vague, unparticularized contentions,” or “notice pleading, with details to be filled in later.” Ocone, 49 NRC at 338 (citation omitted).

Moreover, it remains unclear what exactly the petitioners wish to litigate. They seem to object generally to any radioactive releases, regardless of level or legality. See, e.g., Transcript at 24 (emphasis added)(“the fact is that it is our position that any radioactive airborne releases are cause for concern, and Mr. Mangano, who provided a supplemental affidavit in this matter, is of the opinion that there is no safe level of radioactive airborne release from a nuclear reactor”). They say they “are prepared to establish through expert testimony that any increase in routine radiological effluent to the air and water by the Millstone reactors will expose the public to greater risk of cancer, immunodeficiency diseases and other adverse health effects.” See Appeal Brief at 4. But routine permissible releases occur virtually daily, and they do not

remain at a constant level but go up and down routinely. All such releases are small and must remain within NRC-prescribed limits.

Regulatory limits on effluent concentrations take into account the licensee's need to make frequent adjustments in releases, while still imposing absolute limits on both the rate of release and the dose to the nearest member of the public. The license amendments at issue here have no bearing on the licensee's ability to make these frequent adjustments. If the petitioners are objecting to all possible routine adjustments in effluent releases, then their claim amounts to an impermissible general attack on our regulations governing public doses at operating nuclear plants. See 10 C.F.R. § 2.798. Petitioners "may not demand an adjudicatory hearing to attack generic NRC requirements or regulations, or to express generalized grievances about NRC policies." Oconee, 49 NRC at 334.

Latching onto language from the dissent below, the petitioners on appeal suggest that their concern also is with effluents "that 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." Appeal Brief at 7-8, citing dissent, 53 NRC at 296. Again however, the petitioners offer no basis for associating this hypothetical risk with the transfer of monitoring requirements from the technical specifications to the REMODCM. The current amendments, for example, have nothing to do with setpoints. See note 5, supra, and accompanying text. One might endlessly hypothesize scenarios of potential injury at nuclear power plants, but not all such claims trigger licensing actions and agency hearings. "[M]embers of the public cannot be allowed to litigate before the Commission any

and all issues that occur to them without demolishing the regulatory process.” Perry, 44 NRC at 329 n.37 (citing Bellotti v. NRC, 725 F.2d 1380, 1382 (D.C. Cir. 1983)).

The petitioners point to the licensee’s statement that the amendments at issue “will not significantly increase the type and amounts of effluents that may be released offsite,” and “will not significantly increase individual or cumulative occupational radiation exposures.” See Appeal Brief at 3, 6 (emphasis added). From this the petitioners apparently conclude that there will be increases in exposure. Id. But the cited statements appear in a section of the license amendment application discussing whether the license amendments would require an Environmental Review. Under 10 C.F.R. § 51.22, a licensee and the NRC staff must consider whether there will be a “significant change in the types or significant increase in the amounts of effluents that may be released offsite,” and whether there will be a “significant increase in individual or cumulative occupational radiation exposure.” See 10 C.F.R. § 51.22(c)(9)(ii). Hence, the license amendment application understandably used “significance” terminology in addressing these specific points. We see no basis to infer from these statements a veiled implication that the amendments will lead to increases in radiation exposures. In any event, the NRC will receive annual reports of effluent monitoring, see 10 C.F.R. § 50.36a(a)(2), and is prepared to take action if necessary.

The petitioners further question whether the license amendments concern not simply low-level effluent monitoring but also high-range monitors, which can detect potential high-level radiological releases from reactor accidents. See Appeal Brief at 8. They rest this speculation on out-of-context references to comments in the license amendment application’s cover letter, but show no familiarity with the actual provisions of the license amendments. Comments noted by the petitioners apparently referred to plans to take down a high-range monitor used by Millstone Unit 1, which is being decommissioned. See DNC’s Appeal Brief (4/23/01) at 3 n.6.

These license amendments at issue here, however, have no bearing on high-range accident monitors or their surveillance procedures.

Lastly, the petitioners suggest that the licensee cannot be trusted to follow regulatory standards. A footnote in their appeal brief refers to “an earlier era of flagrant cost-cutting at Millstone,” when “sample points were wilfully changed in the mid-90s so that reports of chemical discharges would show only negligible traces of pollution.” See Appeal Brief at 8 n.17. The petitioners say that this “led to state and federal enforcement actions and criminal penalties under the Clean Water Act.” Id. In addition, in their Amended Petition before the Licensing Board, the petitioners state that in 1999, Northeast Nuclear Energy Company pled guilty in a federal district court to falsifying information to the NRC. See Amended Petition at 3.

In some past cases, the Commission or its hearing boards have admitted contentions based upon claims of poor licensee “character” or “integrity.” We have always insisted, however, that “[f]or management ‘character’ to be an appropriate basis for adjudication in a licensing proceeding, ‘there must be some direct and obvious relationship between the character issues and the licensing action in dispute.’” Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 189 (1999)(citation omitted). We have, for instance, admitted “character”-based issues in a proceeding to transfer total operational authority and control to a new management organization, whose particular and current high-ranking officers allegedly displayed a pattern of deliberately violating safety regulations. See Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25 (1993). Similarly, we found character allegations directly pertinent when, in a license renewal proceeding, the allegations specifically concerned the current director of the facility, and the current organizational structure of the facility, and were supported by expert witnesses alleged

to have knowledge of the current management. See Georgia Institute of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111 (1995).

We have, however, placed strict limits on “management” and “character” contentions. “Allegations of management improprieties or poor ‘integrity’ ... must be of more than historical interest: they must relate directly to the proposed licensing action.” Georgia Tech, 42 NRC at 120. License amendments proceedings are not a forum “only to litigate historical allegations” or past events with no direct bearing on the challenged licensing action. See Vogtle, 38 NRC at 36 n.22. Here, the events leading to NNECO’s guilty plea and conviction all took place in the mid-1990s. Importantly, the petitioners make no effort to show how these historical events have a direct bearing upon the discrete license amendments now before us. The petitioners have not, for instance, suggested that there are any irregularities in the Millstone effluent monitoring program. Nor have they indicated any pattern of ongoing corporate misconduct at Millstone which reasonably could bear upon the effluent program. There simply has been no link established between the individuals or direct management responsible for falsifying reactor operator examination results years ago, at issue in the NNECO conviction, and Millstone’s effluent monitoring program or the managers currently responsible for overseeing it.

On the contrary, the petitioners acknowledge that these past events occurred during “an earlier era” at Millstone. See Appeal Brief at 8 n.17. They also acknowledge that the ownership and control of Millstone has changed. NNECO is no longer the owner or operator of Millstone Units 2 and 3, the subject of the current amendments. Having provided no indication that there are any current or directly pertinent “character” concerns, the petitioners state only that they “are not prepared to allow the new owners of Millstone the benefit of a doubt with regard to their radiation emissions.” Id. at 9.

To accept the petitioners' reasoning would potentially insert management integrity issues into virtually all license amendment proceedings at facilities with prior violations, no matter the nature of the amendment. We cannot allow admission of contentions premised on a general fear that a licensee cannot be trusted to follow regulations of any kind. As a rule, reactor license amendment applications do not "throw[] open an opportunity to engage in a free-ranging inquiry into the 'character' of the licensee." Zion, 49 NRC at 189 (citing Vogle, 38 NRC at 32). When "character" or "integrity" issues are raised, we expect them to be directly germane to the challenged licensing action. No such link has been established here.

IV. Conclusion

For the reasons given in this decision, the Commission affirms LBP-01-10.

IT IS SO ORDERED.

For the Commission¹¹

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 5th day of December, 2001.

¹¹ Commissioner McGaffigan was not present for the affirmation of this Order. If he had been present, he would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-01-24) have been served upon the following persons by deposit in the U.S. mail, first class, as indicated by an asterisk (*) or through the Nuclear Regulatory Commission's internal distribution as indicated by double asterisks (**), with copies by electronic mail.

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Docket Nos. 50-336/423-LA
COMMISSION MEMORANDUM AND ORDER
(CLI-01-24)

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 5th day of December 2001