

August 31, 1998

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USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'98 SEP -1 P12:35

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF GENERAL
COUNSEL
ADJUTANT GENERAL

In the Matter of)

COMMONWEALTH EDISON COMPANY)

(Zion Nuclear Power Station,
Units 1 and 2))

Docket Nos. 50-295/304-LA -2

NRC STAFF'S RESPONSE TO REQUEST FOR STAY FILED
BY PETITIONERS EDWIN DIENETHAL, RANDY ROBARGE
AND COMMITTEE FOR SAFETY AT PLANT ZION

INTRODUCTION

On August 18, 1998, Petitioners Edwin Dienethal, Randy Robarge and the newly formed "Committee for Safety at Plant Zion" filed a petition for leave to intervene, a statement of contentions, and a request to stay the Staff's final "No Significant Hazards Consideration" (NSHC) finding, in connection with a notice of issuance published in the *Federal Register* on August 12, 1998.¹ In accordance with 10 C.F.R. § 2.730, the NRC Staff ("Staff") herein responds to that portion of the Petitioners' filing that constitutes their request for a stay.² As more fully set forth below, the Staff submits that a final NSHC finding may not be stayed except upon *sua sponte* review by the Commission and that, in any event, the Petitioners have failed to

¹ See "Petition to Intervene and Initial Statement of Contentions and Request for Stay," dated August 18, 1998 ("Supp. Petition"). Mr. Dienethal had previously filed (1) an initial petition for leave to intervene, dated June 4, 1998 ("Initial Petition"), and (2) an "Amended Petition to Intervene and Statement of Contentions," dated July 31, 1998 ("Amended Petition"), in response to the notice of opportunity for hearing that was provided by the Commission concerning the proposed issuance of the instant license amendment. See discussion *infra* at 3.

² The Staff intends to file a separate response to the Petitioners' petition to intervene and contentions on or before September 4, 1998, in accordance with 10 C.F.R. § 2.714(c).

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demonstrate that a stay of the Staff's final NSHC finding is warranted. Accordingly, the Staff opposes the request for a stay and recommends that it be denied.

BACKGROUND

On March 30, 1998, Commonwealth Edison Company (the "Applicant") submitted a license amendment application, seeking to make certain changes to its operating license for Zion Station, Units 1 and 2, in order to facilitate plant activities following the permanent shutdown and defueling of the facility. Pursuant to this amendment: (1) the facility's current technical specifications (the "Custom Technical Specifications" or "CTS"), would be retained in lieu of the recently approved (but never implemented) "Improved Technical Specifications" (the "ITS"); (2) five license conditions which had been deleted upon the approval of the ITS would be reinstated;³ and (3) changes would be made to Section 6 of the CTS, which would alter certain management titles and responsibilities to reflect the permanently shut down plant organization, allow the use of Certified Fuel Handlers in lieu of personnel licensed under 10 C.F.R. Part 55, reduce shift staffing numbers and the on-shift crew composition, and alter certain verbiage which could be interpreted to imply that the units are operational.

On May 6, 1998, the Staff published a "Notice of Consideration of Issuance," "Proposed No Significant Hazards Consideration Determination," and "Notice of Opportunity for Hearing" in the *Federal Register*. The Notice advised that, by June 5, 1998, "any person whose interest may be affected by this proceeding and who wishes to participate as a party in the

³ These license conditions pertain to: (a) requirements for reactor operation in Modes 1 or 2; (b) the weight of loads carried over fuel stored in the spent fuel pool; (c) the secondary water chemistry monitoring program used to inhibit steam generator degradation; (d) the program for maintenance, inspection and testing to reduce leakage of highly radioactive fluids outside containment during a serious transient or accident; and (e) airborne iodine concentration monitoring under accident conditions.

proceeding must file a written request for a hearing and a petition for leave to intervene" in accordance with the requirements of 10 C.F.R. § 2.714 (63 Fed. Reg. at 25102). The Notice further advised that "[i]nterested persons should consult a current copy of 10 CFR 2.714," and included specific instructions as to the required contents of a petition for leave to intervene, including the requirement that a petition must "set forth with particularity the interest of the petitioner in the proceeding and how that interest may be affected by the results of the proceeding." ⁴ See 10 C.F.R. § 2.714(d)(1).

On June 4, 1998, Edwin Dienethal filed his initial petition for leave to intervene and request for hearing, concerning the instant license amendment. An Atomic Safety and Licensing Board was then established to preside over any proceeding that may be held in connection with Mr. Dienethal's petition,⁵ and responses in opposition to Mr. Dienethal's initial petition were filed by the Applicant and Staff on July 1 and 8, 1998, respectively. On July 31, 1998, Mr. Dienethal filed an "Amended Petition to Intervene and Statement of Contentions" ("Amended Petition"), in which he amended and supplemented his statement of standing, and filed 19 contentions that he sought to litigate in the proceeding. On August 18, 1998, the Applicant and Staff filed their responses to Mr. Dienethal's statement of standing, as set forth in his Amended Petition.⁶

⁴ See "Biweekly Notice; Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations," 63 Fed. Reg. 25101, 25105 (May 6, 1998).

⁵ See "Establishment of Atomic Safety and Licensing Board," 63 Fed. Reg. 33097 (June 17, 1998).

⁶ In an Order issued on August 13, 1998, the Licensing Board granted the Applicant's motion to defer the filing of responses to Mr. Dienethal's contentions, until a ruling had been issued on his standing to intervene.

While the above-described developments progressed in the adjudicatory proceeding, the Staff completed its review of the requested license amendment. On July 24, 1998, the Staff issued the requested license amendment, together with a supporting safety evaluation and final no significant hazards consideration finding, having first notified the Commission of its intent to do so.⁷ Notice of this action was published in the *Federal Register* on August 12, 1998.⁸

On August 18, 1998 -- *i.e.*, the same date that the Applicant and Staff were due to file their responses to Mr. Dienethal's Amended Petition -- Mr. Dienethal, Mr. Robarge and the Committee for Safety at Plant Zion filed the instant "Petition to Intervene and Initial Statement of Contentions and Request for Stay." Therein, the Petitioners (a) requested a hearing on the Staff's final NSHC determination, asserting that they have standing to intervene thereon, (b) restated, in somewhat modified form, the 19 contentions that Mr. Dienethal had previously filed in response to the prior *Federal Register* Notice, and (c) requested that the Commission stay the Staff's "issuance" or "implementation" of the final NSHC determination -- based on their assertion that an opportunity for hearing had been provided by the Commission in its *Federal Register* Notice of August 12, 1998, concerning the Staff's final NSHC determination and issuance of the instant license amendment.

The Staff herein responds to the Petitioners' request for stay. For the reasons set forth below, the Staff submits that the request for stay contravenes 10 C.F.R. § 50.58(b)(6) and can not be granted; further, even if such a stay was permitted by the Commission's regulations, the Petitioners' request fails to address the governing legal principles applicable to stay requests

⁷ See Board Notification 98-01, dated August 4, 1998, and attachments thereto.

⁸ "Biweekly Notice; Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations," 63 Fed. Reg. 43200, 43217 (Aug. 12, 1998).

and fails to demonstrate that a stay is warranted in this instance. Accordingly, the Petitioners' request for stay should be denied.

DISCUSSION

The Commission's regulations do not contain a provision that applies to requests for a stay of licensing actions or final NSHC determinations by the NRC Staff. To the contrary, the Commission has held that a "no significant hazards consideration" determination by the Staff is a final determination that is not subject to appeal or to "indirect review through the guise of an application for a stay of the Staff's finding" -- although it may be stayed by the Commission acting under its inherent, discretionary supervisory authority. *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 4 (1986), *rev'd and remanded on other grounds sub nom. San Luis Obispo Mothers for Peace v. NRC*, 799 F.2d 1268 (9th Cir. 1986). This is consistent with 10 C.F.R. § 50.58(b)(6), which provides: "No petition or other request for review of or hearing on the staff's significant hazards consideration determination will be entertained by the Commission. The staff's determination is final, subject only to the Commission's discretion, on its own initiative, to review the determination."⁹

In their Petition, the Petitioners explicitly state that they seek to stay the Staff's final NSHC determination. Thus, the Petition states that the Petitioners "are requesting a stay concerning the implementation of the [NSHC] Finding" (Petition, at 2), and that they seek to stay "the issuance of the No Significant Hazards [Consideration] Determination" until a hearing is held

⁹ See also, *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), LBP-88-19, 28 NRC 145, 153-54 (1988) (under 10 C.F.R. § 50.58(b)(6), the Staff's NSHC finding "is not subject to review by licensing boards," and this "jurisdictional bar . . . extends not only to the [NSHC] finding itself but also to the immediate effectiveness of an amendment issued after all steps requisite to the issuance of such an amendment have been taken by the Staff").

on their contentions (*Id.* at 51). However, as set forth above, the Staff's no significant hazards consideration finding is a final determination that is not subject to challenge in a hearing, may only be reviewed *sua sponte* by the Commission, and is not subject to indirect review through an application for a stay. *Diablo Canyon*, CLI-86-12, 24 NRC at 4; 10 C.F.R. § 50.58(b)(6). Accordingly, the Petitioners' request for a hearing on the Staff's "no significant hazards consideration" determination, and their request to stay that determination pending a hearing on their contentions, can not be granted.¹⁰

Further, even if the Petitioners' stay request was not barred by the Commission's regulations, the Petitioners would be obliged to show that it satisfies the criteria enunciated in *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), as incorporated into 10 C.F.R. § 2.788. *See, e.g., Sequoyah Fuels Corp.* (Gore, OK Site), CLI-94-9, 40 NRC 1, 6 (1994); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95,

¹⁰ Contrary to the Petitioners' apparent belief, the Notice published in the *Federal Register* on August 12, 1998, did not provide an opportunity for hearing on either the issuance of the Zion license amendment or the Staff's related NSHC determination. Rather, this "Biweekly Notice," like other biweekly notices issued by the Commission, consisted of several parts -- only some of which included an opportunity for hearing. These were as follows: (1) "Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing," 63 Fed. Reg. at 43200; (2) "Previously Published Notices of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing," 63 Fed. Reg. at 43215 (indicating that the notice period for such amendments established in the original notice was not being extended); and (3) "Notice of Issuance of Amendments to Facility Operating Licenses," 63 Fed. Reg. at 43216. The first of these categories provided an opportunity for hearing, while the second category referenced an existing opportunity for hearing for which the notice period had not yet closed. However, no opportunity for hearing was provided for licensing actions listed under the third category -- such as the Zion amendment -- for which an opportunity for hearing had been provided previously and for which the notice period had already closed. A further opportunity for hearing is simply not required -- or provided -- for final actions such as this, either by the Atomic Energy Act, the Administrative Procedure Act, the Commission's regulations, or the instant *Federal Register* Biweekly Notice.

100 n.5 (1994); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-11, 37 NRC 251, 258 (1993); *Nuclear Fuel Services, Inc.* (Western New York Nuclear Service Center), CLI-81-29, 14 NRC 940, 941 (1981).¹¹

Pursuant to 10 C.F.R. § 2.788, any party may file an application for a stay of the effectiveness of "a decision or action of a presiding officer" in the proceeding, within 10 days after service of that decision or action, pending the filing of and a decision on a petition for review. An application for stay is required to be no longer than 10 pages, exclusive of affidavits, and must contain (1) a concise summary of the decision or action which is requested to be stayed, (2) "a concise statement of the grounds for stay, with reference to the factors specified in paragraph (e) of [10 C.F.R. § 2.788]," and (3) appropriate reference to the record or affidavits by knowledgeable persons. More particularly, § 2.788(e) provides as follows:

(e) In determining whether to grant or deny an application for a stay, the Commission or presiding officer will consider:

(1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;

(2) Whether the party will be irreparably injured unless a stay is granted;

(3) Whether the granting of a stay would harm other parties; and

(4) Where the public interest lies.

¹¹ See also, *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 5 (1986), *rev'd and remanded on other grounds sub nom. San Luis Obispo Mothers for Peace v. NRC*, 799 F.2d 1268 (9th Cir. 1986) (indicating that although a party may not seek to stay an NSHC finding by the Staff, the Commission could do so under its inherent supervisory authority, applying the stay criteria in 10 C.F.R. § 2.788).

It is well established that the party requesting a stay bears the burden of persuasion in showing that it is entitled to a stay. *Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981); *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 270-71 (1978); *Consumers Power Co.* (Midland Plant, Units 1 & 2), ALAB-395, 5 NRC 772, 785 (1977). The stay request must be denied where the requestor fails to make a strong showing that it is likely to prevail on the merits or will suffer irreparable harm in the absence of a stay. *See, e.g., Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-82-11, 15 NRC 1383, 1384 (1982).

While none of the four factors set forth above is dispositive, the most crucial is whether irreparable injury will be incurred by the requestor in the absence of a stay. *Farley*, CLI-81-27, 14 NRC at 797; *Westinghouse Electric Corp.* (Exports to the Philippines), CLI-80-14, 11 NRC 631, 662 (1980). It has been held that a party "must reasonably demonstrate, not merely allege" the occurrence of irreparable harm. *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-814, 22 NRC 191, 196 (1985) (emphasis in original).¹² Speculation about a nuclear accident does not, as a matter of law, constitute the imminent, irreparable injury required to be shown in order to prove a party's entitlement to a stay. *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-84-5, 19 NRC 953, 964 (1984) (denying stay of license reinstatement); *accord, Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 748 n.20 (1985).

¹² Similarly, it has been held that general assertions, in conclusory terms, of alleged harmful effects, the lack of harm to other parties, and where the overall public interest lies, are insufficient to demonstrate the requestor's entitlement to a stay. *United States Department of Energy* (Clinch River Breeder Reactor Plant), ALAB-721, 17 NRC 539, 544 (1983).

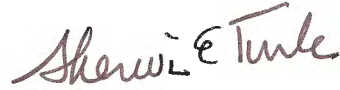
An application of these principles to the instant stay request demonstrates that it should be denied. First, nowhere in the petition do the Petitioners set forth or address the four factors governing requests for a stay. On this basis alone, the request for stay should be denied. *Comanche Peak*, CLI-93-2, 37 NRC at 58 n.2; 10 C.F.R. § 2.788(b)2). Second, even if the Petitioners had specifically discussed the four factors, nothing in their petition establishes the "strong showing" of irreparable harm or likelihood of success on the merits, which they are required to make in order to demonstrate their entitlement to a stay. At most, their petition may be read to assert that in the absence of a stay, the reduction in on-shift radiation protection personnel at the Zion plant will lead to inadequate protection of the public health and safety in the event of an accident or contamination event (*see* Petition at 38). However, apart from this general assertion, the Petitioners have failed to present any specific facts, postulated accident scenarios, or analyses to satisfy their burden of showing that the staffing changes provided by the instant amendment could adversely affect the public health and safety if an accident or contamination event should occur. *Diablo Canyon*, CLI-84-5, 19 NRC at 964; *Perry*, ALAB-820, 22 NRC at 748 n.20.¹³

¹³ Other statements made by the Petitioners are even more conclusory in nature, and fail to sustain the Petitioners' burden of proving irreparable harm. Thus, apart from the statement discussed in the text above, the rest of the Petitioners' assertions of harm generally consist of (1) a recitation that the amendment fails to satisfy the criteria for finding that the amendment involves no significant hazards considerations, specified in 10 C.F.R. 50.92 (Petition at 3), and (2) the boilerplate assertion -- reiterated at the conclusion of each contention -- that the Petitioners' contentions and other "material further demonstrates why a finding of no significant hazards cannot be issued in this matter and why a stay should be entered" (Petition at 23-24, 26, 28, 29, 32-33, 34, 35, 38, 40, 41, 42, 43, 44, 46, 48, 49).

CONCLUSION

For the reasons set forth above, the Petitioners' request for a stay should be denied.

Respectfully submitted,

A handwritten signature in dark ink, reading "Sherwin E. Turk". The signature is written in a cursive style with a large, stylized "S" and "T".

Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 31st day of August 1998

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of

COMMONWEALTH EDISON COMPANY

(Zion Nuclear Power Station,
Units 1 and 2)

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Docket Nos. 50-295/304-LA

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATION STAFF

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S RESPONSE TO REQUEST FOR STAY FILED BY PETITIONERS EDWIN DIENETHAL, RANDY ROBARGE AND COMMITTEE FOR SAFETY AT PLANT ZION" in the above captioned proceeding have been served on the following through deposit in the Nuclear Regulatory Commission's internal mail system, or by deposit in the United States mail, first class, as indicated by an asterisk, this 31st day of August 1998:

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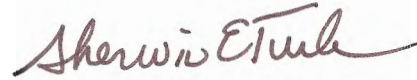
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A handwritten signature in dark ink, reading "Sherwin E. Turk". The signature is fluid and cursive, with the first name "Sherwin" and last name "Turk" clearly legible.

Sherwin E. Turk
Counsel for NRC Staff