

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Dr. Jerry R. Kline
Frederick J. Shon

DOCKETED
USNRC

'98 SEP 14 P12:24

OFFICE OF THE SECRETARY
ADMINISTRATIVE JUDGES

In the Matter of)

COMMONWEALTH EDISON COMPANY)

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

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

ASLBP No. 98-750-06-LA

September 10, 1998

PETITIONER'S RESPONSE TO THE SEPTEMBER 2, 1998
SHOW CAUSE ORDER OF THE ASLB

On September 2, 1998 this Board issued a "show cause" order concerning the petition to intervene filed by the petitioners on August 18, 1998. The Board's Order stated:

The Petitioners shall show cause why their August 18, 1998 petition should not be dismissed as precluded by the Commission's regulations, 10 C.F.R. § 50.58(b)(6).

Order issued in ASLBP No. 98-750-06-LA (September 2, 1998).

Petitioners Committee for Safety at Plant Zion, Mr. Randy Robarge and Mr. Edwin Dienethal hereby file there response to the show cause order.

RESPONSE

I. PROCEDURAL BACKGROUND

On August 12, 1998 the U.S. Nuclear Regulatory Commission published a "Biweekly Notice in the Federal Register. In its introductory paragraph, this Notice stated as follows:

This provision grants the Commission the authority to issue and make immediately effective any amendment to an operating license upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

63 Federal Register No. 155, p. 43200 (August 12, 1998).

This portion of the Federal Register notice applies to the “No Significant Hazards” determination issued for Plant Zion and is the subject matter of the instant petition to intervene. This provision restates the law which gives the “Commission the authority” to “issue and make immediately effective” the proposed amendments to Plant Zion’s operating license. It also restates the law which provides the Commission the authority to take this action “notwithstanding the pendency before the Commission of a request for a hearing.” Again, this aspect of the Federal Register notice unquestionably applies to the current action. In this case, Mr. Dienethal, one of the petitioners in this case, also applied for a hearing on the underlying license amendments and the “No Significant Hazards” determination was issued while that request for a hearing was pending.

Thus, the Federal Register notice referenced the Commission’s legal authority to take certain action in regard to the “No Significant Hazards” matter. Thereafter, on pages 43216-17 of the Federal Register notice, the Commission issued a public notice of its determination on the “No Significant Hazards” determination related to the Zion facility. Specifically, on page 43216, the Commission gave “Notice of Issuance of Amendments to Facility Operating Licenses” and thereafter printed specific references to each plant in which the Commission had issued the amendments based on the “No Significant Hazards” determination. The reference to Commonwealth Edison’s application was contained on the following page of the register. Id., p.

43217.

In reference to the Commonwealth Edison amendments, the Commission stated as follows in the Federal Register:

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act

Id. p. 43216 (emphasis added).

The Petitioners in this case filed their request for a hearing within thirty days of the publication of the Commission's action in the Federal Register.

II. ARGUMENT

This case concerns the legal significance of the August 12, 1998 Federal Register notice wherein the Commission publicly published its determination to issue the proposed amendments to the Zion nuclear facility pursuant to a "No Significant Hazards" determination. Thus, the issue in this proceeding concerns the rights of the various parties when the "Commission" issues an amendment following a "No Significant Hazards" determination.

The Applicant and the NRC Staff have pointed this Board to the regulation appearing at 10 C.F.R. § 50.58(b)(6). This regulation is of general application to all "No Significant Hazards" determinations issued by NRC "staff" and discusses petitions for review of the "staff's determination." However, this regulation is not controlling in this case.

This proceeding concerns an amendment to a Class 104 license issued under 10 C.F.R. § 50.21(b). The NRC has special regulations related to "No Significant Hazards" determinations related to this sub-class of NRC licenses. As a matter of interpreting the NRC regulations,

regulations of specific application [regulations which specifically apply to Class 104 licenses issued under 10 C.F.R. § 50.21(b)] would apply in this case.

The NRC has published regulations which specifically relate to the issuance of “No Significant Hazards” determinations concerning Class 104 licenses issued pursuant to 10 C.F.R. § 50.21. This rule is found at 10 C.F.R. § 2.105. This rule concerns a parties right to a hearing when a “hearing is not required by the Act or this chapter.” 10 C.F.R. § 2.105(a). In such circumstances, the NRC has an exception to the general rule that no hearings are permitted on matters related to “No Significant Hazards” determinations. If such a determination is made in a proceeding related to a Class 104 license issued under 10 C.F.R. § 50.21(b), a hearing is allowed on that determination. 10 C.F.R. § 2.105(a)(4)(i). These rules are fully consistent with the relevant provisions of the Atomic Energy Act, 42 U.S.C. § 2239(a)(2)(A).

The controlling regulation states as follows:

If the Commission determines under § 50.58 of this chapter that the amendment involves no significant hazards consideration, though it will provide notice of opportunity for a hearing pursuant to this section, it may make the amendment immediately effective and grant a hearing thereafter . . .

10 C.F.R. § 2.105(a)(4)(i).

In this case the “Commission” made the determination referenced in 10 C.F.R. § 2.105(a)(4)(i) in its August 12th Federal Register notice. In that notice the NRC specifically reported to the general public that the “Commission has determined” that the amendment, which was requested by Commonwealth Edison and which is at issue in this case, could be granted prior to granting the hearing on the petition for intervention filed by Mr. Dienethal. Once the Commission made this determination, in accordance with the above-referenced regulation, the

petitioners in this case had the right to petition for a "hearing" on the Commission's ruling and have such a hearing after the issuance of the amendment.

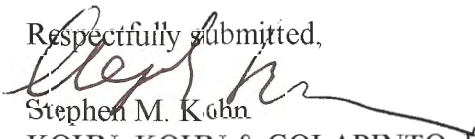
Thus, the petitioners have the right to a hearing on the "No Significant Hazards" determination made by the Commission and published to the general public on August 12, 1998. 10 C.F.R. § 2.105(a)(4)(i). They also have the right to "meaningful" participation in NRC proceedings related to the granting of the amendment under the "Solly Amendment" process, including the right to a "hearing after the license amendment takes effect." Senate Rep. No. 97-113, p.14, 1982 U.S. Code Cong. & Admin. News 3592, 3598."

Consequently, this proceeding should not be dismissed pursuant to 10 C.F.R. § 50.58(b)(6). Instead, Petitioners' are entitled to a hearing on the merits of the license amendment provisionally granted to Commonwealth Edison under the Solly Amendment process and are entitled to a hearing on all matters directly or indirectly related to the merits of the determination published by the Commission in the August 12, 1998 Federal Register notice related to the Zion nuclear facility.

CONCLUSION

For the foregoing reasons, Petitioner's August 18, 1998 petition should not be dismissed.

Respectfully submitted,


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OFFICE OF THE SECRETARY
RULES AND PRACTICE
ADJUDICATION DIVISION

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served by first class mail, postage prepaid, and by facsimile transmission (where indicated), on this 10th day of September, 1998, upon:

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