September 18, 1998

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
COMMONWEALTH EDISON COMPANY	)	Docket Nos. 50-295/304-LA-2
	)	
(Zion Nuclear Power Station,	)	
Units 1 and 2)	)	

NRC STAFF'S RESPONSE TO
PETITIONERS' "SHOW CAUSE"
MEMORANDUM OF SEPTEMBER 10, 1998

INTRODUCTION

By Order dated September 2, 1998, the Licensing Board directed Petitioners Edwin Dienethal, Randy Robarge, and "Committee for Safety at Plant Zion" ("CSPZ") to show cause by September 11, 1998, why their petition for leave to intervene[1] on a final "No Significant Hazards Consideration" (NSHC) finding should not be dismissed, in light of the prohibition on challenges to NSHC findings set forth in 10 C.F.R. § 50.58(b)(6).[2] On September 10, 1998, the Petitioners filed a memorandum in response to the Licensing Board's Order, in which they asserted that the *Federal Register* notice of the final NSHC finding afforded them an opportunity for hearing, and that their petition is not barred by 10 C.F.R. § 50.58(b)(6).[3]

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[1] *See* "Petition to Intervene and Initial Statement of Contentions and Request for Stay," dated August 18, 1998 ("NSHC Petition").

[2] In its Order of September 2, 1998, the Licensing Board also denied the Petitioners' request for stay. *See Id.*, at 3.

[3] "Petitioner's [sic] Response to the September 2, 1998 Show Cause Order of the ASLB" ("Memorandum"), dated September 10, 1998.

In accordance with the Licensing Board's Order, the NRC Staff ("Staff") herein responds to the Petitioners' Memorandum. For the reasons set forth below, the Staff submits that the Petitioners are incorrect in their assertions that the *Federal Register* notice of the NSHC finding afforded them an opportunity for hearing and that such a hearing is not barred by the Commission's regulations. Accordingly, in accordance with 10 C.F.R. § 50.58(b)(6), the Staff submits that the Petition should now be dismissed.

BACKGROUND

On March 30, 1998, Commonwealth Edison Company (the "Applicant") submitted an application 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. Specifically, pursuant to this license 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;[4] 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.

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[4] 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.

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*.[5] The Notice invited comments on the proposed NSHC finding, to be filed within 30 days (63 Fed. Reg. at 25101), and further 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 proceeding must file a written request for a hearing and a petition for leave to intervene" pursuant to 10 C.F.R. § 2.714 (*Id.* at 25102). No comments were filed with respect to the Staff's proposed NSHC determination, notwithstanding the fact that the Notice had indicated that such comments "will be considered in making any final determination." 63 Fed. Reg. at 25101. On June 4, 1998, however, Edwin Dienethal filed a petition for leave to intervene concerning the amendment ("Initial Petition").

An Atomic Safety and Licensing Board was established to consider Mr. Dienethal's Initial Petition and to preside over any proceeding that may be held concerning the license amendment application (the "OLA proceeding"). 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 his statement of standing, and filed 19 contentions that he sought to litigate in the OLA proceeding. Responses to the Amended Petition's statement on standing were filed by the Applicant and Staff on August 18, 1998.[6]

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

[6] *See* "Commonwealth Edison Company's Reply to Petitioner's Amended Petition to Intervene," dated August 18, 1998; and "NRC Staff's Response to Amended Petition to Intervene Filed by Edwin D. Dienethal," dated August 18, 1998.

While these events progressed in the adjudicatory proceeding, the Staff completed its review of the requested license amendment. On July 24, 1998, upon making a final no significant hazards consideration finding, the Staff issued the requested license amendment, together with a supporting safety evaluation -- having first notified the Commission of its intent to do so.[7] A notice of the Staff's final NSHC finding and issuance of the amendment was published in the *Federal Register* on August 12, 1998.[8]

On August 18, 1998, Mr. Dienethal, Mr. Robarge and the CSPZ filed their "Petition to Intervene and Initial Statement of Contentions and Request for Stay" ("NSHC Petition"), in which they asserted that the August 12 *Federal Register* Notice had afforded them an opportunity for hearing. The Petitioners (a) requested a hearing on the Staff's final NSHC determination, (b) restated, in somewhat modified form, the 19 contentions that Mr. Dienethal had previously filed in the OLA proceeding, and (c) requested that the Commission stay the Staff's "issuance" or "implementation" of the final NSHC determination. On August 31, 1998, the Applicant filed a response in opposition to the NSHC Petition and the Staff filed a response in opposition to the stay request contained in that Petition.[9]

By Order dated September 2, 1998, the Licensing Board denied the Petitioners' request for stay, and directed the Petitioners to show cause by September 11, 1998, why the NSHC Petition "should not be dismissed as precluded by the Commission's regulations,

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[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).

[9] *See* "Commonwealth Edison Company's Response to Petition to Intervene and Initial Statement of Contentions and Request for Stay," dated August 31, 1998; "NRC Staff's Response to Request for Stay Filed by Petitioners Edwin Dienethal, Randy Robarge and Committee for Safety at Plant Zion," dated August 31, 1998.

10 C.F.R. § 50.58(b)(6). . . . [which] specifically prohibits the Commission from entertaining any petition seeking a hearing on, or review of, the Staff's significant hazards consideration determination except upon the Commission's own initiative." (Order at 2). On September 10, 1998, the Petitioners filed their Memorandum in response to the Licensing Board's Order.

DISCUSSION

A. The Petitioners Incorrectly Assert that an Opportunity for Hearing Exists With Respect to the Final NSHC Determination.

In their Petition, the Petitioners indicated that they seek to intervene concerning the Staff's final NSHC determination, notice of which was published in the *Federal Register* on August 12, 1998 -- three months after the Notice of Consideration and Notice of Opportunity for Hearing on the proposed amendment had been published. In doing so, the Petitioners asserted that the August 12th Notice (a) "provided an opportunity for persons with an interest in the [NSHC] Finding to file a petition for leave to intervene on or before September 11, 1998," and (b) "stated that contentions could be filed within 15 days prior to the first prehearing conference in this matter" (NSHC Petition at 1, 2). In their response to the Licensing Board's Order, the Petitioners elaborate upon these assertions, claiming that (a) the notice of opportunity for hearing contained in the introductory paragraph of the August 12th Notice applies to the NSHC determination for Plant Zion which appears "[t]hereafter, on pages 43216-17 of the Federal Register notice" (Memorandum at 2), (b) this Notice was issued by the Commission rather than by the Staff (*Id.* at 3), and (c) while 10 C.F.R. § 50.58(b)(6) bars challenges to proposed NSHC findings issued by the Staff, it does not apply to final NSHC findings issued by the Commission (*Id.* at 3-4).

The Petitioners' assertions are simply incorrect. First, as noted by the Licensing Board, "the Commission's August 12, 1998 Federal Register Notice does not appear on its face

to invite persons interested in the Staff's finding to file intervention petitions or requests for a hearing." (Order at 1). Indeed, the Notice 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 one of which provided a new opportunity for hearing.[10] Thus, the first category (newly proposed NSHC findings) provided an opportunity for hearing, while the second category pertained to licensing actions that had an existing opportunity for hearing for which the notice period had not yet closed; 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. The fact that the NSHC finding for Zion appears 16 pages "after" the paragraph relied upon by the Petitioners is of no consequence, given the fact that this so-called "introductory paragraph" appears in a wholly different section of the Notice. Contrary to the Petitioners' argument, the structure and language of the August 12 Notice make it clear that the only new opportunity for hearing provided by that Notice pertained to licensing actions for which no previous opportunity had been provided. No opportunity for hearing was provided for licensing actions like the instant Zion amendment, for which an opportunity for hearing had been provided previously.

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[10] 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" (indicating that the notice period for such amendments established in the original notice was not being extended), *Id.* at 43215; and (3) "Notice of Issuance of Amendments to Facility Operating Licenses," *Id.* at 43216.

Second, there is no merit in the Petitioners' argument that the Commission's regulations provide an opportunity for hearing upon the issuance of a license amendment or final NSHC finding where, as here, an opportunity for hearing was previously provided upon publication of a notice of consideration of such issuance and notice of proposed NSHC finding. While the Petitioners argue that Zion was licensed as a Class 104 facility (Memorandum at 3), this is irrelevant for present purposes: Under 10 C.F.R. § 2.105, the NSHC and notice requirements for amendments to Class 104 licenses issued under 10 C.F.R. § 50.21(b), are the same as the NSHC and notice requirements for amendments to Class 103 licenses issued under 10 C.F.R. § 50.22. In either case, 10 C.F.R. § 2.105(a)(4) generally requires publication of a notice of proposed amendment to the license -- and, in either case, the Commission is authorized to issue the amendment upon making a final determination that no significant hazards consideration is involved, even if a hearing request has been filed.

Contrary to the Petitioners' assertion (Memorandum at 4-5), 10 C.F.R. § 2.105(a)(4)(i) does not require or afford an additional opportunity for hearing upon the issuance of a final NSHC finding. Rather, this regulation is a subpart of § 2.105(a), which relates explicitly to proposed NSHC findings; contrary to the Petitioners' "interpretation" (Memorandum at 3), the regulations do not provide an additional opportunity for hearing in connection with final NSHC findings where, as here, an opportunity for hearing was provided with the notice of consideration of issuance and notice of the proposed NSHC finding.

While the Petitioners attempt to distinguish between licensing actions taken by the "Commission" and those taken by "the Staff" (Memorandum at 3), this distinction is invalid. In fact, both the proposed and final NSHC findings were issued by the Staff, acting for (and under delegation by) the Commission. *Compare* 63 Fed. Reg. 25101 ("the Commission has made a

proposed determination that the following amendment requests involve no significant hazards consideration"), *and* 63 Fed. Reg. 43216-17 ("the Commission has issued the following amendments," "the Commission has made appropriate findings as required by the Act and the Commission's rules and regulations," details may be seen "in the Commission's related letter, Safety Evaluation and/or Environmental Assessment, as indicated," and "the Commission's related evaluation of the amendments is contained in a Safety Evaluation dated July 24, 1998").

Finally, there is no merit in the Petitioners' suggestion that the denial of their NSHC Petition would deprive them of their right to "meaningful" participation in NRC licensing proceedings or "to a hearing on the merits of the license amendment" (Memorandum at 5). In fact, the Petitioners were provided an opportunity for hearing on the instant license amendment, through the May 1998 notice of opportunity for hearing on the proposed issuance of the license amendment -- which is the subject of Mr. Dienethal's petition to intervene in a separate adjudicatory proceeding. No further opportunity for hearing is required or afforded by the Commission's regulations, the Atomic Energy Act, the Administrative Procedure Act, or the *Federal Register* Notice of August 12, 1998 concerning the final NSHC finding.

B. The Petition to Intervene on the Staff's Final NSHC Finding Contravenes 10 C.F.R. § 50.58(b)(6) and Must Be Dismissed.

In its Order of September 2, 1998, the Licensing Board observed that 10 C.F.R. § 50.58(b)(6) "specifically prohibits the Commission from entertaining any petition seeking a hearing on, or review of, the Staff's significant hazards consideration determination, except upon the Commission's own initiative" (Order at 2). Notwithstanding the Licensing Board's specific reference to this controlling regulation, the Petitioners' Memorandum in response to the Licensing Board's Order fails to address the significance of 10 C.F.R. § 50.58(b)(6) in this proceeding.

The Licensing Board's understanding of the significance of 10 C.F.R. § 50.58(b)(6) in this proceeding is entirely correct. That regulation provides as follows:

> "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."

Id.; emphasis added. *Accord, 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) (NRC regulations afford no right of direct appeal to the Commission on the merits of the Staff's NSHC finding).

The regulation's prohibition against challenges to proposed NSHC findings has been explained by the Licensing Board in another proceeding, as follows:

> A determination of no significant hazards consideration is not a substantive determination of public health and safety issues for the hearing on the proposed amendment. The only effect of such a determination on the hearing is to establish whether the amendment may be approved before a hearing is held or, if there is a finding of significant hazards consideration, a final decision must await the conclusion of the hearing.
>
> Commission regulation is very clear that a Licensing Board is without authority to review Staff's significant hazards consideration determination. 10 C.F.R. § 50.58(b)(6). The Licensing Board will . . . not consider any challenge to a significant hazards consideration determination by Staff. . . .

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC 179, 183 (1991). *Accord, Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power

Station), LBP-90-6, 31 NRC 85, 90-91 (1990) (a proposed NSHC determination "is not subject to challenge in a license amendment proceeding. . . . [T]he finding is a procedural device whose only purpose is to determine the timing of the hearing (before or after issuance of the amendment)"); *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-89-15, 29 NRC 493, 500 (1989) (rejecting a contention that challenged a final NSHC finding, as "beyond the jurisdiction of [the] Board"); *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"); *Florida Power and Light Co.* (St. Lucie Plant, Unit No. 1), LBP-88-10A, 27 NRC 452, 456-57 (1988) (rejecting a contention that challenged a final NSHC finding). *See also, North Atlantic Energy Service Corp.* (Seabrook Station Unit No.1), LBP-98-23, 48 NRC __ (Sept. 3, 1998), slip op. at 14-15, *sua sponte review on other grounds pending,* CLI-98-18, 48 NRC __ (Sept. 17, 1998) (the Board "has no jurisdiction to determine whether . . . [a] license amendment should be made immediately effective").[11]

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[11] In *Seabrook*, the Licensing Board declined to reject contentions challenging the Staff's proposed NSHC finding, on the grounds that (a) the petitioner later clarified that it sought to challenge the underlying proposed amendment rather than the Staff's NSHC finding, and (b) Commission policy favors decisions on the merits rather than on the basis of pleading defects. *Id.*, LBP-98-34, slip op. at 15-16. The Licensing Board's statement of policy may not be entirely correct and is currently under *sua sponte* review by the Commission (CLI-98-18, slip op. at 2). In any event, however, that policy does not apply here, where the NSHC Petition clearly challenges the Staff's NSHC finding and dismissal of the Petition does not rest upon a mere pleading defect. Further, dismissal of the NSHC Petition does not foreclose an opportunity for hearing on the instant license amendment, as provided by the previous *Federal Register* Notice.

The clear mandate of § 50.58(b)(6), as interpreted and applied in the adjudicatory decisions cited above, requires the dismissal of the NSHC Petition in this proceeding, notwithstanding the Petitioners' arguments to the contrary. Nothing in the Petitioners' Memorandum, filed in response to the Licensing Board's Order to show cause, establishes any reason to disregard this mandate in the instant proceeding.[12]

CONCLUSION

For the reasons set forth above, the Petitioners' request for hearing and petition to intervene on the Staff's final NSHC determination should be dismissed.

Respectfully submitted,

Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 18th day of September 1998

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[12] Even if the NSHC Petition was not barred by 10 C.F.R. § 50.58(b)(6), at best it would have to be considered as a late-filed petition to intervene relating to the Notice of May 6, 1998, concerning the proposed issuance of the instant amendment. In that event, the Petition would nonetheless be deficient, in that (1) the Petitioners have not shown that their late filing is supported by good cause or by a balancing of the factors set forth in 10 C.F.R. § 2.714(a)(1); (2) Petitioners Robarge and CSPZ have not shown that they possess standing to intervene concerning the instant license amendment; and (3) the Petitioners have not provided any information beyond that presented in Mr. Dienethal's filings in the OLA proceeding, to show that their interests could be adversely affected by the instant license amendment. Accordingly, even if the NSHC Petition was not barred by 10 C.F.R. § 50.58(b)(6), it could not be granted due to its failure to satisfy the requirements of 10 C.F.R. § 2.714.

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S RESPONSE TO PETITIONERS' 'SHOW CAUSE' MEMORANDUM OF SEPTEMBER 10, 1998" 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 18th day of September 1998:

Thomas S. Moore, Chairman
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dr. Jerry R. Kline
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dr. Frederick J. Shon
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Atomic Safety and Licensing Board
Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Office of the Secretary (2)
ATTN: Rulemakings and Adjudications
Staff
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555

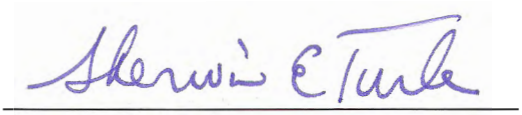
Adjudicatory File (2)
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Edwin D. Dienethal*
8354 47th Court
Kenosha, WI 53142

David W. Jenkins, Esq.*
Robert E. Helfrich, Esq.
Commonwealth Edison Co.
Law Department Room 1535
125 South Clark Street
P.O. Box 767
Chicago, IL 60603

Philip E. Troy, Esq.*
6531 Chestnut Grove Lane
Charlotte, NC 28210

David K. Colapinto, Esq.*
Stephen M. Kohn, Esq.
Michael D. Kohn, Esq.
Kohn, Kohn & Colapinto
3233 P Street, N.W.
Washington, D.C. 20007



Sherwin E. Turk
Counsel for NRC Staff