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USNRC

July 8, 1998

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

'98 JUL -9 P12:02

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

ADJUTANT GENERAL

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

NRC STAFF'S RESPONSE TO THE  
PETITION FOR LEAVE TO INTERVENE  
FILED BY EDWIN D. DIENETHAL

On June 4, 1998, Mr. Edwin D. Dienethal filed a petition for leave to intervene in this proceeding ("Petition"), concerning the application of Commonwealth Edison Company (the "Licensee") to amend its operating license for the Zion Nuclear Power Station, Units 1 and 2, dated March 30, 1998.<sup>1</sup> For the reasons set forth below, the NRC Staff ("Staff") submits that Mr. Dienethal has failed to establish his standing to intervene in this matter and has otherwise failed to satisfy the Commission's requirements governing petitions for leave to intervene. Accordingly, the Staff opposes the Petition and recommends that it be denied.

INTRODUCTION

On March 30, 1998, the Licensee submitted an application to amend its operating license for Zion Station, Units 1 and 2, in which it requested that the following changes be made to its

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<sup>1</sup> By Order dated June 17, 1998, the Atomic Safety and Licensing Board directed that responses to Mr. Dienethal's Petition be submitted by the Licensee on or before July 1, 1998, and by the NRC Staff on or before July 8, 1998. On July 1, 1998, the Licensee filed a response in opposition to Mr. Dienethal's Petition. See "Commonwealth Edison Company's Answer to Petition to Intervene," dated July 1, 1998.

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license in order to facilitate plant activities following the permanent shutdown and defueling of the facility:

1. The Zion facility's current technical specifications (the "Custom Technical Specifications" or "CTS"), would be retained in lieu of the recently approved "Improved Technical Specifications" (the "ITS") -- which were approved for implementation by License Amendments 178/165 in December 1997 but were never implemented;

2. Five license conditions which were deleted by License Amendments 178/165, based on their relocation to the ITS or Updated Final Safety Analysis Report (UFSAR), would be reinstated;<sup>2</sup> and

3. Changes would be made to Section 6 of the CTS ("Administrative Controls"), which would (a) alter certain management titles and responsibilities to reflect the permanently shut down plant organization, (b) allow the use of Certified Fuel Handlers in lieu of personnel licensed under 10 C.F.R. Part 55, (c) reduce the required shift staffing numbers and on-shift crew composition, and (d) alter certain verbiage which may imply that the units are still operational (Lic. App., Attachment A at 1-3, 5).<sup>3</sup>

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<sup>2</sup> 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.

<sup>3</sup> The Licensee explained that during the period in which it was preparing to implement the ITS, it continued to utilize the CTS -- and that during this period a decision was made to permanently cease operations at the facility (Lic. App., Attachment A at 4). The Licensee stated that it intends to submit a new set of "Permanently Defueled Technical Specifications," applicable to a plant in the permanently shutdown and defueled condition, but that several  
(continued...)

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*.<sup>4</sup> 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 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 that a petition for leave to intervene 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." *Id.* The Notice also stated that "[t]he petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene." *Id.* See 10 C.F.R. § 2.714(d)(1).

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<sup>3</sup>(...continued)

immediate changes are needed at this time to facilitate the transition of the facility from an operational to a permanently shutdown and defueled status. *Id.* In addition, it indicated that the previously approved implementation of the ITS was no longer necessary, in view of its decision to cease operations at the facility. *Id.*

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

On June 4, 1998, Mr. Dienethal filed the instant Petition, in response to the *Federal Register* Notice. Therein, Mr. Dienethal stated that he resides in Kenosha, Wisconsin, within 50 miles of the Zion facility (Petition at 1). In addition, Mr. Dienethal stated that “[t]he operations at Zion Nuclear Station directly impact the health and safety of myself and my family, as well as the health and safety of my community”; and he asserted that he has “financial interests” in the proceeding that result from his “ownership of both real and personal property in close proximity to” the facility. *Id.* However, Mr. Dienethal failed to indicate the precise distance between his home or other activities and the Zion site; moreover, he failed to demonstrate that he would suffer injury in fact by issuance of the requested license amendment for this facility, given his failure to specify the geographic distance from his property and activities to the facility, the nature of his property or other interest that could be harmed by the proposed licensing action, or an explanation of how his interests could be affected by the proposed licensing action. For these reasons, as more fully set forth below, the Staff submits that Mr. Dienethal has failed to establish his standing to intervene in this proceeding.

### DISCUSSION

#### A. Legal Standards Governing Petitions to Intervene.

It is fundamental that any person who wishes to request a hearing or to intervene in a Commission proceeding must demonstrate that he has standing to do so. Section 189a(1) of the Atomic Energy Act, 42 U.S.C. § 2239(a), provides that:

In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license. . . , the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

*Id.* (emphasis added).

The Commission's regulations in 10 C.F.R. § 2.714(a)(2) provide that a petition to intervene, *inter alia*, "shall 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, including the reasons why petitioner should be permitted to intervene, with particular reference to the factors in [10 C.F.R. § 2.714(d)(1)]."<sup>5</sup> Pursuant to 10 C.F.R. § 2.714(d)(1), in ruling on a petition for leave to intervene or a request for a hearing, the presiding officer or Licensing Board is to consider:

- (i) The nature of the petitioner's right under the Act to be made a party to the proceeding.
- (ii) The nature and extent of the petitioner's property, financial or other interest in the proceeding.
- (iii) The possible effect of any order that may be entered in the proceeding on the petitioner's interest.

In order to determine whether a petitioner has met these standards, the Commission applies contemporaneous judicial concepts of standing. *See, e.g., Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992), *review denied sub nom. Environmental & Resources Conservation Organization v. NRC*, 996 F.2d 1224 (9th Cir. 1993); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983).

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<sup>5</sup> Pursuant to § 2.714(a)(2), a petition for leave to intervene must also set forth "the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene." In addition, a petitioner must advance at least one admissible contention in order to be permitted to intervene in a proceeding. 10 C.F.R. § 2.714(b).

To establish standing, a petitioner must show that the proposed action will cause “injury in fact” to his interest, and that the injury is arguably within the “zone of interests” protected by the statutes governing the proceeding. *E.g.*, *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 32 (1993); *Public Service Co. of New Hampshire* (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 266 (1991) (*citing* Three Mile Island, *supra*, 18 NRC at 332). Further, in order to establish standing, the petitioner must establish (a) that he personally has suffered or will suffer a “distinct and palpable” harm that constitutes injury in fact; (b) that the injury can fairly be traced to the challenged action; and (c) that the injury is likely to be redressed by a favorable decision in the proceeding. *Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988); *Vogtle, supra*, 38 NRC at 32; *Babcock and Wilcox* (Apollo, PA, Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 81 (1993).

A petitioner must have a “real stake” in the outcome of the proceeding to establish injury-in-fact for standing. *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 447-48, *aff’d*, ALAB-549, 9 NRC 644 (1979). While the petitioner’s stake need not be a “substantial” one, it must be “actual,” “direct” or “genuine.” *Id.* at 448. A mere academic interest in the outcome of a proceeding or an interest in the litigation is insufficient to confer standing; the requestor must allege some injury that will occur as a result of the action taken. *Puget Sound Power and Light Co.* (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981, 983 (1982), *citing Allied General Nuclear Services* (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420, 422 (1976); *Id.*, LBP-82-26, 15 NRC 742, 743 (1982). Similarly, an abstract, hypothetical injury is insufficient to establish standing to intervene. *Ohio Edison Co.* (Perry Nuclear Power Plant,

Unit 1), LBP-91-38, 34 NRC 229, 252 (1991), *aff'd in part on other grounds*, CLI-92-11, 36 NRC 47 (1992).

It is well established that a person may obtain a hearing or intervene as of right on his own behalf but not on behalf of other persons whom he has not been authorized to represent. *See, e.g., Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989) (individual could not represent plant workers without their express authorization); *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 (1977) (mother could not represent son attending university unless he is a minor or under legal disability); *Combustion Engineering, Inc.* (Hematite Fuel Fabrication Facility), LBP-89-23, 30 NRC 140, 145 (1989) (legislator lacks standing to intervene on behalf of his constituents).

Finally, in operating license amendment proceedings such as this, there is no presumption of standing based upon geographic proximity of a petitioner's residence to a nuclear power reactor. Rather, standing to intervene will depend upon the nexus shown between the petitioner's interests and the proposed licensing action. Thus, standing may be denied in reactor license amendment proceedings where the requested license amendment had not been shown to have a potentially adverse effect on the petitioner's interest. *See, e.g., Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989); *Boston Edison Co.* (Pilgrim Nuclear Power Station, LBP-85-24, 22 NRC 97, 98-99, *aff'd on other grounds*, ALAB-816, 22 NRC 461(1985).

B. The Petition Fails to Meet the Standards for Intervention.

Applying these principles to Mr. Dienethal's petition to intervene, it is clear that he has not met the standards required to establish standing. While Mr. Dienethal alleges that he resides in Kenosha, Wisconsin, within 50 miles of the Zion facility (Petition at 1), he has failed to specify the precise (or approximate) distance between his home and the facility. In addition, while Mr. Dienethal states that he has "financial interests" which could be affected by the proceeding due to his "ownership of both real and personal property in close proximity to" the facility, he has not identified those property interests or the location of the subject property. Similarly, while Mr. Dienethal alleges that "[t]he operations at Zion Nuclear Station directly impact the health and safety of myself and my family, as well as the health and safety of my community," he has altogether failed to show how the license amendment at issue in this proceeding could have any possible effect upon his health and safety, his property interests, or the health and safety or other interest of any person whom he may be authorized to represent in this proceeding. Finally, with respect to persons other than himself, Mr. Dienethal has not identified any family member or other persons whom he seeks to represent in this proceeding, nor has he indicated how those persons could be affected by the instant licensing action. In sum, Mr. Dienethal has not shown that the proposed action will cause him a distinct injury that can fairly be traced to the requested amendment of the facility license.

These omissions are significant, and require that the Petition be denied. As discussed above, the *Federal Register* Notice that the Commission is considering the instant license amendment included specific instructions to interested persons of the requirements for filing a



petition for leave to intervene, consistent with the provisions set forth in 10 C.F.R. § 2.714.

The Notice explicitly recited the requirements set forth in that regulation, as follows:

As required by 10 CFR 2.714, a petition for leave to intervene shall 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. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors:

(1) The nature of the petitioner's right under the Act to be made a party to the proceeding;

(2) The nature and extent of the petitioner's property, financial, or other interest in the proceeding; and

(3) The possible effect of any order which may be entered in the proceeding on the petitioner's interest.

63 Fed. Reg. at 25102. Mr. Dienethal was, therefore, clearly put on notice of the Commission's requirements with regard to a filing a request for a hearing and a petition for leave to intervene. Notwithstanding these clear instructions, Mr. Dienethal made no effort to "set forth with particularity" his interest in the proceeding in a timely manner, or to explain "how that interest may be affected by the results of the proceeding." Rather, after generally asserting that he has property, health and safety interests in the proceeding, he stated only that "[t]hese and other interests which will be stated in my amended petition constitute the nature and extent of my interests in this proceeding" (Petition at 1), and that "an order which decreases the safety risk posed by Plant Zion will serve to maintain the property value of my house and the economic viability of the surrounding area. These and other effects which will be stated in my amended petition represent the possible effect of any order which may be entered in my interest" (*Id.* at 2). These assertions fail to comply with the Commission's requirements that a petitioner

must describe his interests and the possible effect on those interests which may result from the entry of an order in the proceeding, within the time stated in the *Federal Register* Notice.<sup>6</sup>

While Mr. Dienethal states that he seeks to intervene with respect to “each and every aspect of Commonwealth Edison’s proposed amendments” (*Id.*),<sup>7</sup> he has not indicated how any of the various components of the requested license amendment could affect his interests. Thus, no indication has been provided to suggest that retention of the CTS (which have been in place at Zion Station for years) would in any manner change the status quo of the facility, or would have any potential adverse effect on Mr. Dienethal’s interests. Similarly, no indication has been provided to suggest that reinstatement of the five license conditions (which were deleted in anticipation of implementation of the ITS) could have an adverse effect upon Mr. Dienethal’s interests, or that the proposed changes to the Administrative Controls section of the CTS could adversely affect Mr. Dienethal’s interests.

In sum, the Petition fails to identify with particularity Mr. Dienethal’s interests which are sought to be protected by his intervention in this proceeding, and fails to indicate how those

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<sup>6</sup> It has been suggested that a petitioner may amend its petition to cure defects in its demonstration of standing any time up to 15 days prior to the holding of a special prehearing conference (or, if none is held, 15 days prior to the first prehearing conference), in accordance with 10 C.F.R. § 2.714(a)(3). *See, e.g.,* Vogtle, *supra*, LBP-90-29, 32 NRC at 93. However, in adopting § 2.714(a)(3), the Commission indicated that this provision was only intended to accommodate the need for a longer period in which to file contentions; the Commission stated that “[t]imely petitions to intervene which address the petitioners’ interest in the proceeding will still be filed within the initial 30 day period.” Statement of Consideration, 43 Fed. Reg. 17798, 17799 (April 26, 1978). *See also* 10 C.F.R. Part 2, Appendix A, § III(a)(1) and (a)(2).

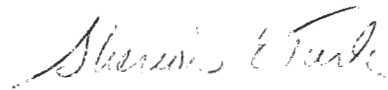
<sup>7</sup> Not all of Mr. Dienethal’s concerns constitute “aspects of the proceeding” which are cognizable within the meaning of § 2.714(a)(2). Thus, while Mr. Dienethal expresses concern over the “safety risk” posed by the Zion facility, only the impacts or risks which may result from the instant license amendment could be considered within the scope of this proceeding.

interests could be adversely affected by the license amendment at issue in this proceeding or by the issuance of an order entered in the proceeding.<sup>8</sup>

CONCLUSION

For the reasons set forth above, the Staff opposes Mr. Dienethal's petition for leave to intervene, and recommends that it be denied.

Respectfully submitted,



Sherwin E. Turk  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 8th day of July 1998

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<sup>8</sup> The Staff notes that the Licensing Board is authorized to afford a petitioner "discretionary intervention," where the petitioner has not demonstrated that it is entitled to intervene as of right. *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 616 (1976). Such a determination would be based upon whether the petitioner has demonstrated a favorable balancing of relevant factors set forth in 10 C.F.R. § 2.714(a)(1) and (d); and of these, the most significant factor to be considered is the extent to which the petitioner may be expected to contribute to the development of a sound record. *Id.* However, where, as here, no showing has been made that the pertinent factors favor the granting of a petition, discretionary intervention should properly be denied.

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Docket Nos. 50-295/304-LA

OFFICE OF THE SECRETARY  
RULEMAKING AND ADJUDICATIONS

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S RESPONSE TO THE PETITION FOR LEAVE TO INTERVENE FILED BY EDWIN D. DIENETHAL" 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 8th day of July 1998:

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Adjudicatory File (2)  
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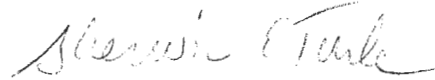
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