

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

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In the Matter of

COMMONWEALTH EDISON COMPANY

(Zion Nuclear Power Station,
Units 1 and 2)

Docket Nos. 50-295/304-LA

ASLBP No. 98-744-04-LA

November 5, 1998

MEMORANDUM AND ORDER
(Resolving Standing Issue)

The petitioner, Edwin D. Dienethal, seeks to intervene in this proceeding involving the license amendment application of the Commonwealth Edison Company ("Applicant") for its Zion Nuclear Power Station, Units 1 and 2, in Lake County, Illinois. In response to the Commission's notice of opportunity for hearing, see 63 Fed. Reg. 25,101, 25,105-06 (1998), the Petitioner timely filed a petition to intervene and an amended petition opposing the requested license amendments. The Applicant and the NRC Staff both challenge Mr. Dienethal's standing to intervene.

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For the reasons set forth below, we conclude that the Petitioner has failed to establish his standing to intervene in this license amendment proceeding.

I. Background

In early 1998, the Commonwealth Edison Company decided to close the Zion Nuclear Power Station. Thus, both Zion units are now defueled and permanently shutdown, although neither unit has yet been decommissioned. The Applicant seeks the requested license amendments in order to facilitate activities at the now shutdown facility. According to the Commission's hearing notice, "[t]he proposed amendments would restore the Zion Custom Technical Specifications (CTS) that had been replaced with Improved Technical Specification[s] [(ITS)] by a previous amendment and would reinstate License Conditions that were deleted by that previous amendment." Id. at 25,105. The Applicant's no significant hazards consideration analysis included in the Commission's hearing notice states that the ITS were never implemented at the facility so the CTS have remained as the binding technical specifications at Zion. Further, that analysis explains that the requested amendments also would restore to the Zion operating licenses the five license conditions that previously had been transferred in the form of requirements to other licensing documents as part of the amendment process for adopting the never-implemented ITS. Id.

Additionally, the Commission's hearing notice states that "[t]he proposed amendment[s] would also modify the CTS to allow the use of Certified Fuel Handlers to satisfy shift staffing requirements and would change management titles and responsibilities to reflect the permanently shutdown organization." Id. In this regard, the Applicant's analysis indicates that the changes to the CTS would reduce shift staffing numbers and crew composition as well as modify language implying the units were operational. Id. at 25,106.

In his intervention petition opposing the Commonwealth Edison Company's license amendment application, Mr. Dienethal asserts that he resides in Kenosha, Wisconsin, within 50 miles of the Zion Nuclear Station and that the Applicant's facility directly impacts his health and safety and the health and safety of his family. Mr. Dienethal's amended petition and an accompanying affidavit explain that he resides with his wife and two minor children 10.4 driving miles, or 8.5 to 9 miles as the crow flies, from the Zion plant. The pleadings state that the Petitioner and his family boat, fish, swim, and play water sports in Lake Michigan where the Applicant's facility discharges effluents and wastes. The amended petition and affidavit also state that the Dienethal family frequently uses a bike trail that passes directly in front of the plant in the town of Zion, Illinois, where the Applicant's facility is located and that the Petitioner also plays golf and frequents a park in the town. In

the amended pleadings, Mr. Dienethal further asserts that his children play soccer once a week six months of the year just nine miles from the Zion plant and that he and his wife attend each of his children's soccer matches.

In further cataloguing his activities near the Zion plant, the intervention pleadings indicate that the school the Dienethal children attend is located 12 miles from the Applicant's facility and the Petitioner and his wife share the task of driving their children to and from school. The amended petition states that the Petitioner and his wife also travel within one mile of the nuclear plant three or four times a week to shop, buy gasoline, visit the post office, or attend movies and that Mr. Dienethal visits on a regular basis an essential business supplier located one mile from the plant. Additionally, the pleadings assert that many of the roads used by the Petitioner in his business travel are the same ones used by the Applicant to transport radioactive waste from the Zion plant. Finally, the intervention filings claim that the food and water the Petitioner and his family consume are affected by the Zion plant because Mr. Dienethal purchases food from farms located within ten miles of the plant and that his drinking water, as well as the fish he catches and eats, come from Lake Michigan where the Applicant dumps waste from the Zion facility.

According to the amended petition and accompanying affidavit, the various activities of the Petitioner and his

family in the vicinity of the Zion plant place them at risk of future negative health effects directly traceable to the Applicant's facility. Specifically, paragraphs 19 and 20 of Mr. Dienethal's affidavit state:

19. I have specific concerns about the injuries that could result to my family and the local communities that derive from the proposed amendments by Commonwealth Edison. . . . I believe that the proposed amendment presents many threats to the public health and safety, harm to the environment, and harm to the health of employees at Plant Zion. These injuries would result from the structural and functional changes in Plant Zion proposed by the amendment or if any mishap should occur while Plant Zion is functioning under the proposed changes of the amendment.

20. [I]f Plant Zion functions under the proposed amendments, the potential injuries to me and my family, Plant Zion workers, the community, and the local environment include, but are not limited to: 1. LOCA (Los[s] of Coolant Accident), 2. radiological concerns, 3. unsafe levels of radiation for the employees at the plant and the general public, 4. undetectable radiation contamination by employees, 5. contamination of the local community and the environment, 6. increase risk of accident at plant Zion, and 7. contamination of Lake Michigan.

Finally, the amended petition asserts that the challenged amendments pose a risk to the value of Mr. Dienethal's real property as well as to the property values of the surrounding community.

II. Analysis

A petitioner's right to participate in a Commission reactor operating license amendment proceeding flows from section 189a of the Atomic Energy Act, as amended. In pertinent part, that section provides that "[i]n 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." 42 U.S.C. § 2239(a)(1)(A). Parroting the language of section 189a, the Commission's regulations provide that "[a]ny person whose interest may be affected by a proceeding and who desires to participate as a party shall file a written petition for leave to intervene." 10 C.F.R. § 2.714(a)(1). The regulations further specify that "[t]he petition 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." 10 C.F.R. § 2.714(a)(2). In ascertaining whether a petitioner has pled a sufficient "interest" within the meaning of the Atomic Energy Act and the Commission's regulations to intervene as of right in a licensing proceeding, the Commission years ago held that contemporaneous judicial concepts of standing are to be applied. Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976).

According to the Commission, those judicial principles require that to establish standing the petitioner must state a concrete and particularized injury, i.e., an injury in fact, that is fairly traceable to the challenged licensing action and likely to be redressed by a favorable decision. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC __, __ (slip op. at 3) (Oct. 23, 1998); Quivira Mining Co. (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 6 (1998); Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995). The asserted injury may be either an actual one or harm that is threatened in the future, but the injury must be to an interest that is arguably within the zone of interests protected by the statutes governing NRC proceedings -- the Atomic Energy Act or the National Environmental Policy Act of 1969. Yankee Atomic, CLI-98-21, 48 NRC at __ (slip op. at 3); Quivira, CLI-98-11, 48 NRC at 6.

In both his initial intervention petition and his amended petition, Mr. Dienethal explicitly states that he seeks to intervene in the license amendment proceeding and his intervention petitions only refer to a singular petitioner seeking intervention. Therefore, even though he also asserts various injuries to his wife, family, employees at the Applicant's facility, and the community at large, Mr. Dienethal is the sole petitioner before us. Thus, it is only Mr.

Dienethal's standing that is determinative of his right to intervene in this proceeding.

The gist of the Petitioner's standing claim is that his many activities in the vicinity of the Zion plant place him within a zone of harm of possible future negative health effects from the Applicant's facility. The intervention pleadings nowhere explicitly state that a release of radioactive fission products from the two unit Zion Nuclear Power Station into the environment where the Petitioner's activities take place will negatively impact his health, safety, and property values, but that fact is clearly implicit in the pleadings. Thus, the Petitioner's long list of activities, that, inter alia, regularly place him as close as one mile to the Zion plant throughout the year provides an adequate statement of future harm from the Applicant's facility to meet the standing requirement of pleading a threatened injury in fact.

The pleading of an injury in fact, however, is only one element of the requirements for establishing the Petitioner's standing. Mr. Dienethal must also demonstrate that the claimed negative health effects and property value diminution from the offsite release of radioactive fission products at the Zion plants is fairly traceable to the amendments that the Applicant seeks. Stated otherwise, the Petitioner must show the causal link between his asserted harm and the proposed license amendments. In this regard, the Commission has indicated that

"[s]uch a determination is not dependent on whether the cause of the injury flows directly from the challenged action, but whether the chain of causation is plausible." Sequoyah Fuels Corp. (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 (1994). Here, as the Applicant and the Staff correctly argue in opposing the Petitioner's standing, Mr. Dienethal has failed to establish a plausible chain of causation between his alleged injury and the Applicant's proposed license amendments.

Contrary to Mr. Dienethal's apparent belief, in Commission license amendment proceedings -- in contrast to proceedings for reactor construction permits or operating licenses -- the presumption found in agency precedents that confers standing, without more, on a petitioner who resides or otherwise conducts activities in the vicinity of a nuclear power plant applies only if the challenged license amendments present an "obvious potential for offsite consequences." Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 330 (1989). When, as here, the Zion reactors are permanently shutdown and defueled, it cannot reasonably be concluded that the license amendments of the type at issue in this proceeding create an obvious potential for offsite consequences. Therefore, the Petitioner "must allege some specific 'injury in fact' that will result from the action taken." Id. Yet, even construing the intervention pleadings most favorably for the Petitioner, as Commission precedent

requires, Georgia Tech, CLI-95-12, 42 NRC at 115, Mr. Dienethal's pleadings fall far short of this required demonstration of causation.

The challenged amendments restore the Zion CTS that had been replaced by the never-implemented ITS and reinstate, as part of the CTS, five license conditions that had been changed to requirements and added to other licensing documents as part of the amendment process adopting the ITS. Because the ITS had never been implemented at the time the Applicant permanently shutdown and defueled the Zion plants, the instant license amendments merely restore the Applicant's facility to the status it had while operating. In other words with respect to the technical specifications for the facility, these amendments do nothing more than restore the status quo to the Zion plants. Nowhere in his intervention pleadings, however, does the Petitioner explain, as he must in order to establish his standing to intervene, how these amendments could plausibly lead to the offsite release of radioactive fission products from either of the shutdown and defueled Zion reactors.

The challenged amendments also modify the Zion CTS to allow the use of Certified Fuel Handlers to satisfy shift staffing requirements, change management titles and responsibilities to reflect the permanently shutdown organization, and alter certain language in the technical specifications to remove any implication that the Zion units are operational. Once again,

however, the Petitioner's pleadings fail to explain adequately how these amendments could plausibly lead to the offsite release of radioactivity from reactors that are permanently shutdown and defueled so that the spectrum of accidents with offsite consequences is vastly diminished.

Rather than explain the process by which the proposed license amendments could cause him future negative health effects and diminish the value of his property, the Petitioner in his amended petition and accompanying affidavit merely lists seven items that he claims increase his risk of injury should the amendments be adopted. First, the Petitioner states that his risk of injury from the proposed amendments is increased because of loss of coolant accidents. Yet loss of coolant accidents can only occur in operating reactors, not reactors that are permanently shutdown, defueled, and depressurized. The Petitioner also claims the challenged amendments increase the risk of accidents at the Zion plants. But the type of accident that credibly could occur in permanently shutdown and defueled reactors from these license amendments is anything but self-evident. Nowhere does the Petitioner set forth a plausible or credible causal chain for any such accident or explain how the risk of such an accident is increased by the Applicant's proposed amendments. Similarly, the Petitioner lists radiological concerns and various on-and-off site radioactive contamination as increasing his risk of injury from these amendments. But the

Petitioner's pleadings are silent with respect to any plausible chain of causation for such radioactive contamination resulting from the challenged amendments.

In short, the Petitioner's unsubstantiated allegations simply fail to demonstrate a plausible nexus between the challenged license amendments and Mr. Dienethal's asserted harm. Because Mr. Dienethal's intervention pleadings fail to establish the causation element essential to establish standing, his petition fails to demonstrate that the Petitioner has standing to intervene in this license amendment proceeding.¹

III. Conclusion

For the foregoing reasons, we find that the Petitioner, Edwin D. Dienethal, lacks sufficient interest within the meaning of section 189a of the Atomic Energy Act, 42 U.S.C. §

¹Mr. Dienethal's argument that he has standing to intervene based upon his allegations that the Applicant lacks the necessary character and competence to manage the Zion facility also is without merit. Contrary to the Petitioner's assertions, this license amendment proceeding does not concern the Applicant's failure to manage properly the Zion plants. Rather, the scope of the proceeding is defined by the substance of the license amendments on which the notice for opportunity for hearing is based. Here, the challenged license amendments do not implicate the Applicant's character and competence and the Petitioner's various allegations about the Applicant's past management practices are wholly outside the scope of the proceeding. Moreover, in order to benefit from the presumption that residency and activities near a nuclear power plant, without more, confer standing upon a petitioner, the challenged license amendments must present an obvious potential for offsite consequences. St. Lucie, CLI-89-21, 30 NRC at 329-30. It is not, as Mr. Dienethal would have it, the Petitioner's own allegations about the offsite consequences of the Applicant's conduct that makes the presumption applicable.

2239(a)(1)(A), and section 2.714(a) of the Commission's regulations, 10 C.F.R. § 2.714(a), to intervene in this license amendment proceeding. Accordingly, the Petitioner's intervention petition is denied and the proceeding is terminated.

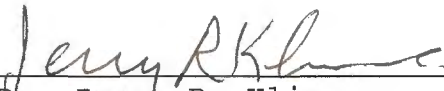
Pursuant to 10 C.F.R. § 2.714a, the Petitioner, within ten (10) days of service of this Memorandum and Order, may appeal the Order to the Commission by filing a notice of appeal and accompanying brief.

It is so ORDERED.

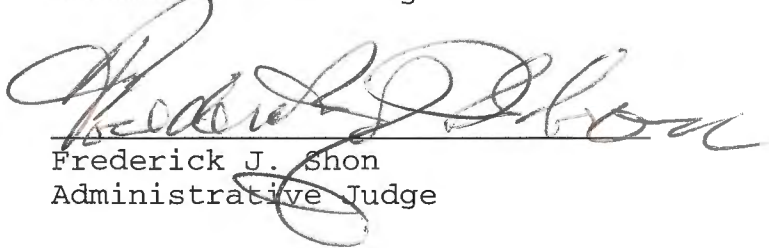
THE ATOMIC SAFETY AND
LICENSING BOARD



Thomas S. Moore, Chairman
Administrative Judge



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Rockville, Maryland
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMO & ORDER (LBP-98-27) have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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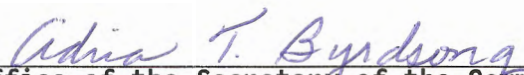
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Docket No.(s)50-295/304-LA
LB MEMO & ORDER (LBP-98-27)

Dated at Rockville, Md. this
5 day of November 1998


Office of the Secretary of the Commission