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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

OFFICE OF THE  
FILE  
ADJUTANT GENERAL

In the Matter of )

COMMONWEALTH EDISON COMPANY )

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

Docket Nos. 50-295/304-LA

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NRC STAFF'S BRIEF IN RESPONSE TO THE  
APPEAL FILED BY EDWIN D. DIENETHAL FROM  
THE LICENSING BOARD'S DECISION IN LBP-98-27

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December 1, 1998

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INTRODUCTION

On November 5, 1998, the Atomic Safety and Licensing Board ("Licensing Board") denied the petition for leave to intervene which had been filed by Mr. Edwin D. Dienethal ("Petitioner") in this proceeding, on the grounds that the Petitioner had failed to demonstrate a plausible causal link between the license amendment at issue herein and any injury to his interests, and that he had therefore failed to establish his standing to intervene. *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), LBP-98-27, 48 NRC \_\_\_\_ (1998), slip op. at 2, 9.<sup>1</sup> On November 16, 1998, Mr. Dienethal timely filed an appeal from the Licensing Board's decision.<sup>2</sup>

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<sup>1</sup> In a separate but related proceeding, the Licensing Board denied the petition for leave to intervene that had been filed by Mr. Dienethal and two other petitioners, in which they sought to challenge the NRC Staff's determination that the instant license amendment involved no significant hazards consideration. *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), LBP-98-24, 48 NRC \_\_\_\_ (Oct. 5, 1998). No appeal has been filed from that decision.

<sup>2</sup> See "Notice of Appeal" and "Brief in Support of Petitioner's Appeal" ("App. Br."), filed November 16, 1998.

The NRC Staff ("Staff") hereby files its brief in response to Mr. Dienethal's appeal. For the reasons set forth below, the Staff opposes Mr. Dienethal's appeal and recommends that the Licensing Board's decision be affirmed.

### STATEMENT OF THE CASE

This proceeding involves a license amendment application filed by Commonwealth Edison Company ("Licensee") on March 30, 1998, which sought to make certain changes to its operating license for Zion Station, Units 1 and 2, in order to facilitate activities following the permanent shutdown and defueling of the facility.<sup>3</sup> These were as follows: (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");<sup>4</sup> (2) five license conditions which had been deleted upon approval of the ITS would be reinstated;<sup>5</sup>

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<sup>3</sup> Letter from John C. Brons, Site Vice President, Zion Nuclear Station, to Document Control Desk, NRC, dated March 30, 1998 (Subject: "Application for Amendment to Facility Operating Licenses to Restore Custom Technical Specifications, Reinstate Previous License Conditions, Change Management Titles and Responsibilities, Allow Use of Certified Fuel Handlers, Change Shift Staffing and Crew Composition, and Eliminate Verbiage Implying that the Units Are Operational") ("OLA").

<sup>4</sup> See OLA Attachment A at 1, 4. The Licensee indicated that it plans to submit a new set of "Permanently Defueled Technical Specifications," applicable to the plant in the permanently shutdown and defueled condition, but that the current changes are needed to facilitate the transition from an operational to a permanently shutdown facility. It further indicated that implementation of the ITS was no longer necessary in view of its decision to cease operations at the facility. *Id.* at 4.

<sup>5</sup> These license conditions pertain to: (a) 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. See OLA Attachment A at 1-3.

and (3) changes would be made to Section 6 of the CTS, which would change certain management titles and responsibilities to reflect the permanently shutdown 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, change the on-shift staffing and crew composition, and change certain verbiage which could be interpreted to imply that the units are operational.<sup>6</sup>

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>7</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 further stated (*Id.*):

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. . . .

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<sup>6</sup> See OLA Attachment A at 6-9.

<sup>7</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 his initial petition for leave to intervene ("Initial Petition"). Therein, he stated that he resides in Kenosha, Wisconsin, within 50 miles of the Zion facility; 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 that he has "financial interests" in the proceeding as a result of his "ownership of both real and personal property in close proximity to" the facility (Initial Petition, at 1). Responses to the Initial Petition were filed by the Licensee and Staff on July 1 and July 8, 1998, respectively,<sup>8</sup> in which they expressed their views that Mr. Dienethal had failed to demonstrate he would suffer injury in fact by issuance of the requested license amendment, given his failure to state (a) the geographic distance from his property and activities to the facility, (b) the nature of his property or other interest that could be harmed by the proposed action, or (c) how his interests could be affected by the proposed action.

By Order dated July 10, 1998, the Licensing Board afforded Mr. Dienethal an opportunity to "amend his intervention petition to address any shortcomings, or other matters, in his initial petition," and directed him to file a supplement to his petition "containing all of his proffered contentions" in accordance with the requirements of 10 C.F.R. § 2.714(b)(2); and the Licensing Board afforded the Licensee and Staff an opportunity to respond to Mr. Dienethal's statement on standing and the admissibility of his contentions.<sup>9</sup>

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<sup>8</sup> See "Commonwealth Edison Company's Answer to Petition to Intervene," dated July 1, 1998, at 3, 4-8; and "NRC Staff's Response to the Petition for Leave to Intervene Filed by Edwin D. Dienethal," dated July 8, 1998, at 4, 8-11.

<sup>9</sup> By Order dated August 13, 1998, the Board granted the Licensee's motion to defer the filing of responses to contentions until a ruling is issued on the Petitioner's standing to intervene.

On July 31, 1998, Mr. Dienethal filed "Petitioner's Amended Petition to Intervene and Statement of Contentions" ("Amended Petition"), together with a supporting Affidavit, in which he (a) elaborated upon the location of his residence and other activities within the vicinity of the Zion facility, (b) asserted that the license amendment at issue in this proceeding could adversely affect his interests, including the health and safety of his family, and (c) set forth 19 contentions pertaining to the proposed license amendment and other aspects of the facility's operation.<sup>10</sup> Responses to Mr. Dienethal's Amended Petition were filed by the Licensee and Staff on August 18, 1998 -- in which they expressed their views that the Amended Petition failed to demonstrate the Petitioner's standing to intervene in this proceeding, in that he had not set forth with particularity any credible means whereby his interests could be adversely affected by the proposed amendment.<sup>11</sup>

On November 5, 1998, the Licensing Board issued its decision on Mr. Dienethal's standing to intervene. LBP-98-27, *supra*. In its decision, the Licensing Board ruled that Mr. Dienethal "failed to establish his standing to intervene in this license amendment proceeding" (*Id.*, slip op. at 2), in that he had not shown any potential injury to his interests as a result of an offsite release of radioactive fission products at the facility that "is fairly traceable to the amendments" at issue in the proceeding -- *i.e.*, he had "failed to establish a plausible chain of

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<sup>10</sup> On July 24, 1998, the Staff issued the requested license amendment, having first made a final no significant hazards consideration finding, and having notified the Commission of its intent to issue the amendment. See Board Notification 98-01, dated August 4, 1998, and attachments thereto; "Notice of Issuance of Amendments to Facility Operating Licenses," 63 Fed. Reg. 43216, 43217 (Aug. 12, 1998).

<sup>11</sup> See "NRC Staff's Response to Amended Petition to Intervene Filed by Edwin D. Dienethal," dated August 18, 1998 ("Staff Resp. to Amended Petition"); and "Commonwealth Edison Company's Reply to Petitioner's Amended Petition to Intervene," dated August 18, 1998.

causation between his alleged injury and the Applicant's proposed license amendments." *Id.*, slip op. at 8, 9. On November 16, 1998, Mr. Dienethal filed the instant appeal from the Licensing Board's decision, pursuant to 10 C.F.R. § 2.714a.

### ARGUMENT

In his appeal from the Licensing Board's decision, Mr. Dienethal asserts that the Board erred in one single respect: He alleges that the Board erroneously found that he had failed to establish "a plausible nexus between the challenged license amendments' and a potential 'harm.'" App. Br. at 2. Mr. Dienethal asserts that he did establish this "plausible nexus," through his assertion that the removal of the on-shift "radiation protection person" from the required shift crew composition could result in a "potential offsite release of radioactive fission products." *Id.* at 4-5.<sup>12</sup> Mr. Dienethal further explains that this concern was identified in his Contention 10 (which, in turn, incorporated various other contentions). *Id.*, citing Amended Petition at 29-30.

For the reasons set forth below, the Staff submits that Mr. Dienethal's challenge to the Licensing Board's decision should be rejected, in that (a) he has failed to provide any credible reason to believe that the removal of the "Radiation Protection Person" from the on-shift crew composition of a defueled and shutdown nuclear plant could result in the offsite release of radioactive materials and harm to his interests, particularly in light of his failure to address other radiation protection requirements that apply to the facility, and (b) his filings before the Licensing Board failed to set forth this concern with sufficient clarity to support his standing to intervene.

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<sup>12</sup> The requirement for a "Radiation Protection Person" was included in former Technical Specification (TS) Figure 6.1-1 ("Minimum Shift Crew Composition"), and is deleted from the amended version of that Figure. Compare OLA Attachment B, draft TS p. 327 with OLA Attachment B, revised TS p. 327.

I. The Licensing Board Correctly Determined that Mr. Dienethal Had Failed to Demonstrate A Plausible Nexus Between the Proposed Amendment and Any Harm to His Interests.

A. General Requirements Governing Standing to Intervene.

In its decision, the Licensing Board set forth a succinct statement of the requirements that govern standing to intervene in Commission adjudicatory proceedings. As stated by the Licensing Board, any person who requests a hearing or seeks to intervene in a Commission proceeding must demonstrate that he has standing to do so, in accordance with section 189a of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2239(a), and the Commission's requirements in 10 C.F.R. § 2.714(a). *See* LBP-98-27, slip op. at 6. As the Board noted, section 189a of the Act provides that "[i] any proceeding under this Act, for the . . . 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.* As the Board further noted, the Commission's regulations in 10 C.F.R. § 2.714(a) provide that any person who wishes to participate as a party in a proceeding must file a petition for leave to intervene which, *inter alia*, "set[s] 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 [§ 2.714(d)(1)]." *Id.*<sup>13</sup>

The Licensing Board further observed that, in "ascertaining whether a petitioner has pled a sufficient 'interest' within the meaning of the Atomic Energy Act and the Commission's

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<sup>13</sup> Pursuant to 10 C.F.R. § 2.714(d)(1), the Licensing Board is required 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, and (iii) the possible effect of any order that may be entered in the proceeding on the petitioner's interest.

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." *Id.*, citing *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2, CLI-76-27, 4 NRC 610, 613-14 (1976)). The Board then observed as follows:

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.

LBP-98-27, slip op. at 7 (emphasis added). *See also Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988); *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 32 (1993).

While Mr. Dienethal does not contest the Licensing Board's recitation of these general principles, he contends that the Board erroneously found that he had not described "an injury in fact that is fairly traceable to the challenged licensing action." App. Br. at 4. For the reasons set forth below, the Staff submits that the Licensing Board correctly applied these principles in determining that Mr. Dienethal had failed to describe an injury in fact that is fairly traceable to

the license amendment at issue herein, and that he therefore failed to demonstrate his standing to intervene.<sup>14</sup>

B. Mr. Dienethal Failed to Describe an Injury in Fact  
That Is Fairly Traceable to the Challenged Licensing Action.

In considering whether Mr. Dienethal had demonstrated his standing to intervene, the Licensing Board found that he lives "10.4 driving miles, or 8.5 to 9 miles, as the crow flies, from the Zion plant." LBP-98-27, slip op. at 3. The Board further found that Mr. Dienethal had set forth a "long list of activities, that, inter alia, regularly place him as close as one mile to the Zion plant throughout the year." *Id.* at 8; *see id.* at 3-4. In addition, the Board found that Mr. Dienethal's filings implicitly suggested that a release of radioactive fission products from the Zion plant into the environment would negatively impact his health, safety and property values. *Id.* at 8. On this basis, the Board found that Mr. Dienethal had provided "an adequate statement of future harm from the Applicant's facility to meet the standing requirement of pleading a threatened injury in fact." *Id.*; emphasis added.

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<sup>14</sup> The Licensing Board further determined that Mr. Dienethal's allegations of "injuries to his wife, family, employees at the Applicant's facility, and the community at large" could not support his standing to intervene -- since Mr. Dienethal was the sole petitioner before the Board, and his standing, alone, would be determinative as to whether he is entitled to intervene in the proceeding. LBP-98-27, slip op. at 7-8. Mr. Dienethal does not appeal from this determination, but he nonetheless continues to assert the interests of the community at large. *See* App. Br. at 15, 16. These assertions should be disregarded. First, no appeal from this determination has been filed, and he is therefore bound by the Board's decision. Second, as the Licensing Board correctly determined, these assertions do not confer standing upon him, in that he may not intervene as of right on behalf of 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).

Notwithstanding these determinations, the Licensing Board found that Mr. Dienethal had failed to demonstrate his standing to intervene, in that he had not satisfied his obligation to show that the claimed negative impacts are fairly traceable to the instant license amendment:

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, . . . Mr. Dienethal has failed to establish a plausible chain of causation between his alleged injury and the Applicant's proposed license amendments.

*Id.* at 8-9.

This determination was entirely correct. As the Licensing Board observed, 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 (*Id.* at 9); rather, standing to intervene will depend upon the nexus shown between the petitioner's interests and the proposed licensing action (*Id.*). Thus, standing properly may be denied in a reactor license amendment proceeding where the requested amendment is not 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). *See generally Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, GA), CLI-95-12, 42 NRC 111, 115-17 (1995).

As the Licensing Board further observed, a petitioner's standing to intervene, based upon alleged injuries from a proposed license amendment, may be presumed "only if the challenged license amendments present an 'obvious potential for offsite consequences.'" LBP-98-27, slip op. at 9, citing *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 330 (1989). The Licensing Board further found, however, that "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." LBP-98-27, slip op. at 9. Accordingly, citing the *St. Lucie* decision, the Board determined that the Petitioner "must allege some specific 'injury in fact' that will result from the action taken." *Id.*

These determinations by the Licensing Board are not challenged by Mr. Dienethal on appeal. Rather, Mr. Dienethal contends that he did allege a specific injury in fact that would result from the instant licensing action, based on his claim that the amendment's removal of the Radiation Protection Person from the required shift crew composition would lead to the potential offsite release of radioactive material. App. Br. at 4, 5. Further, he asserts that a Quality Assurance (QA) breakdown occurred at the site, involving the radiation protection department, which allegedly demonstrates the Applicant lacks "sufficient character and competence to justify any reduction in its radiation protection department staffing," *Id.* at 6; and he asserts that "the further reduction of any training and/or management oversight powers, which may impact the area of radiation protection, unquestionably demonstrates the necessary causal connection between Applicant's proposed amendments and the potential offsite release of radioactive materials." *Id.*



These assertions fail to establish the necessary causal link between the proposed license amendment and any harm to the Petitioner's interests. Apart from the fact that these concerns were never advanced as part of Mr. Dienethal's demonstration of standing before the Licensing Board (*see* discussion *infra* at 16-20),<sup>15</sup> nothing in Mr. Dienethal's filings ever explained why a defueled and shutdown nuclear plant requires that a "Radiation Protection Person" be present at all times to prevent the release of radioactive materials into the environment. In this regard, the Petitioner fails to provide any explanation as to why this person must be present to guard against the offsite release of radioactive materials -- and he fails to identify any Commission requirement that this person be on-shift at all times at a defueled and shutdown nuclear plant.<sup>16</sup> These failures to show the continued need for a Radiation Protection Person fatally affect his Petition, in that such a showing is essential to his demonstration of standing to intervene in this proceeding.

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<sup>15</sup> While the Petitioner's appeal brief focuses upon the alleged effect of removing the Radiation Protection Person from the required shift crew composition, his assertion of standing before the Board addressed the adequacy of plant management, future decommissioning activities, and the continued existence of the plant. For example, the Amended Petition states: "This proceeding concerns the failure of Applicant to properly manage Plant Zion" (Amended Petition at 3); hazards to the public are "posed by the continued presence of radioactive material at the Zion site, and the work which must be performed to decommission the plant . . ." (*Id.* at 4); the Applicant has little economic incentive to manage the plant safely during the decommissioning process (*Id.*); and the alleged harm to Petitioner is "directly traceable to Plant Zion" (*Id.* at 7). The Petitioner's failure to address the removal from the TS of the Radiation Protection Person is further discussed *infra*, at 16-20.

<sup>16</sup> Indeed, draft Commission guidance indicates there is no need for such a person to be on-shift at all times at a defueled nuclear plant. *See* NUREG-1625, "Proposed Standard Technical Specifications for Permanently Defueled Westinghouse Plants" (Draft Report for Comment, March 1998), at 5.0-3 (specifying only that "an individual qualified in radiation protection procedures shall be on site during fuel handling operations or movement of loads over storage racks containing fuel"), and 5.0-4 (Table 5.2.2-1, "Minimum Shift Crew Composition," listing no requirement for a Radiation Protection Person).

Further, Mr. Dienethal fails to address the fact that a defueled nuclear plant, such as Zion, is obliged to comply with the Commission's comprehensive requirements for radiation protection, set forth in 10 C.F.R. Part 20. Those requirements include, *inter alia*, (a) implementation of an approved radiation protection program that is "commensurate with the scope and extent of licensed activities and sufficient to ensure compliance with the provisions of this part" (10 C.F.R. § 20.1101(a)); (b) restrictions on the offsite release of radioactive materials so as to ensure that any doses received by individual members of the public are as low as is reasonably achievable (ALARA) and do not exceed established limits (10 C.F.R. §§ 20.1101(d), 20.1301); (c) the performance of appropriate radiation surveys and personnel monitoring (10 C.F.R. §§ 20.1302, 20.1501); (d) minimization of contamination to the extent practicable (10 C.F.R. § 20.1406); (e) access control in areas of high radiation (10 C.F.R. § 20.1601); (f) the posting of signs in radiation areas and high radiation areas (10 C.F.R. § 20.1902); (g) elaborate provisions governing the disposal of radioactive waste (10 C.F.R. § 20.2001 *et seq.*); and (h) detailed reporting requirements (10 C.F.R. § 20.2201, *et seq.*) -- including immediate, 24-hour, or 30-day notification in the event of incidents having certain potential dose consequences (10 C.F.R. § 20.2202). Mr. Dienethal's failure to provide any reason to believe that a "Radiation Protection Person" must be present at all times at a defueled and shutdown nuclear plant, in the face of these comprehensive existing radiation protection requirements, is fatal to his assertion that the removal of the Radiation Protection Person from the on-shift crew has a "plausible nexus" to any harm to his interests.

With respect to Mr. Dienethal's assertions that a QA breakdown occurred in the plant's radiation protection department, even if deemed to be true, does not support his assertion that

there should be no reduction in "radiation protection department staffing" (App. Br. at 6) -- in that Mr. Dienethal has failed to show that the removal of the Radiation Protection Person will affect QA or the implementation or success of the Applicant's radiation protection program. Similarly, Mr. Dienethal has not explained how the removal of this person from the required shift crew composition will result in a "reduction of any training and/or management oversight powers, which may impact the area of radiation protection" (*Id.*). Likewise, he nowhere explains how the instant amendment, in any manner, will cause a "reduction of any training and/or management oversight powers, which may impact the area of radiation protection," or how any such reduction would result in harm to his interests. Accordingly, there is no merit in Mr. Dienethal's bald assertion that the instant amendment "unquestionably demonstrates the necessary causal connection between Applicant's proposed amendments and the potential offsite release of radioactive materials." *Id.*

Finally, Mr. Dienethal's attempt to introduce the issue of management character and competence into the instant licensing action (*see, e.g.*, App. Br. at 6; Amended Petition at 9, and 11-20), should be rejected. The Commission has previously addressed the issue of when management character and competence may be introduced in a license amendment proceeding. *See Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2)*, CLI-93-16, 38 NRC 25 (1993). In that proceeding, involving the proposed transfer of operating authority to a new licensee, the Commission found that the issue of management character and competence was properly placed into question, in that the proposed license amendment required the Commission to determine whether the proposed licensee was qualified to hold the license. At the same time, however, the Commission cautioned that management integrity or character and competence issues

may not be raised in a license amendment proceeding unless there is a "direct and obvious relationship" between those issues and the licensing action in dispute:

[T]he significance of a total transfer of operational control and responsibility over a nuclear power plant licensed to operate at full power makes relevant to this proceeding the proposed Licensee's integrity and willingness to abide by regulatory requirements. . . .

We do not mean to suggest that every licensing action throws open an opportunity to engage in a free-ranging inquiry into the "character" of the licensee. There must be some direct and obvious relationship between the character issues and the licensing action in dispute. Where, as here, the proposed action concerns the transfer of the license to a new organization and management that will be responsible for the safe operation of the plant, character issues may be directly relevant.

*Id.* at 31-32; emphasis added.

In the instant proceeding, in contrast, the issues of management integrity or character and competence are not placed in issue by the challenged licensing action. On the contrary, the instant amendment essentially seeks to retain the existing "Custom TS" in lieu of implementing the "ITS"; reinstates five license conditions that were deleted upon NRC approval of the ITS; and makes other minor changes in the TS, including shift staffing changes, to reflect the defueled and shutdown condition of the Zion facility. The Licensing Board correctly recognized this fact, stating as follows:

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.

LBP-98-27, slip op. at 12 n.1. The Licensing Board correctly concluded that no issues are presented by the instant amendment that would require the litigation of management character and competence issues in this proceeding. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC \_\_, \_\_, slip op. at 15, 16-17 (Oct. 23, 1998). Accordingly, the Petitioner's attempt to introduce such issues in this proceeding should be rejected.

In sum, despite the Petitioner's conclusory assertion that offsite impacts could result from the instant license amendment, he fails to provide any credible reason to believe that such impacts could occur as a consequence of this amendment. Inasmuch as (a) it is not apparent or "obvious" that the instant licensing action could have any offsite consequence whatsoever, and (b) the Petitioner has not established with particularity any credible reason to believe that offsite consequences could result from the instant licensing action and thus adversely affect his interests, Mr. Dienethal failed to establish his standing to intervene.<sup>17</sup> Accordingly, the Licensing Board properly denied his petition for leave to intervene.

II. Mr. Dienethal's Filings Before the Licensing Board Did Not Describe With Specificity Any Injury in Fact That Is Fairly Traceable to the Challenged Licensing Action.

As the above discussion makes clear, the arguments made by Mr. Dienethal in his appeal brief do not establish the necessary "plausible nexus" between the license amendment at issue in this proceeding and any harm to the Petitioner's interests. While this failure is sufficient to

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<sup>17</sup> *See Georgia Tech, supra*, CLI-95-12, 42 NRC at 116-17; *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72, 74 (1994) (requiring a showing of injury-in-fact that is "concrete and particularized" rather than "conjectural" or "hypothetical," or a "realistic threat" of direct injury resulting from the licensing action).

require the denial of his appeal, it is important to note also that in his filings before the Licensing Board, Mr. Dienethal failed to set forth any demonstration of such a plausible nexus.

Significantly, although the Petitioner's appeal brief focuses almost entirely upon the alleged effect of removing the Radiation Protection Person from the required shift crew composition, this concern was not identified in the discussion of standing that appears in either his Initial or Amended Petition. *See, e.g.*, Amended Petition at 5-10. Rather, his assertion of standing before the Board focused upon the adequacy of plant management in general, future decommissioning activities, and the continued existence of the plant. *Id.* at 3, 4, 7; *see n. 15, supra*. As discussed above, such concerns are beyond the scope of the instant license amendment, and could not establish the Petitioner's standing to intervene in this proceeding.

While Mr. Dienethal argues on appeal that he had raised his concern over the removal of the Radiation Protection Person before the Licensing Board, based on the inclusion of this issue in his contentions (App. Br. at 4, 5, 7), it is clear that no such concern was explicitly stated in the Petitioner's statement of standing. *See* Amended Petition, at 5-10. Similarly, while the Amended Petition refers to the affidavit filed by Mr. Dienethal, *Id.* at 6-9, nowhere in his Affidavit did Mr. Dienethal identify this aspect of the amendment as potentially causing harm to his interests. Rather, Mr. Dienethal's affidavit set forth two conclusory paragraphs related to this issue, one of which listed seven general concerns, as follows:

19. I have specific concerns about the injuries that could result to my family and the local communities that derive from the proposed amendment 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. As my contentions will demonstrate, if 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 (Loss of Coolant Accident), 2. radiological concerns, 3. unsafe levels of radiation for the employees of the plant and the general public, 4. undetectable radiation contamination by employees, 5. contamination of the local community and the environment, 6. increase [sic] risk of accident at Plant Zion, and 7. contamination of Lake Michigan. After reading the affidavit of Randy Robarge, other injuries appear eminent [sic] which include the increased potential of failing to detect radiation in adequate time and the increase [sic] risk of the plant functioning unsafely and outside NRC regulations.

Dienethal Affidavit (Amended Petition, Exhibit 1), at 7.<sup>18</sup> As is evident from a reading of these statements, nowhere do they mention the removal of the Radiation Protection Person from the on-shift crew, and nowhere do they contain any suggestion that the removal of this person from the shift crew composition could lead to injury to Mr. Dienethal's interests.

The Licensing Board explicitly addressed the concerns listed in Mr. Dienethal's affidavit, and found them to be insufficient to establish his standing to intervene:

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,

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<sup>18</sup> The fact that these conclusory allegations of potential impact appear in Mr. Dienethal's affidavit, rather than in the Amended Petition alone, does not afford them any greater weight or significance. See *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

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.

LBP-98-27, slip op. at 11-12. Thus, as the Licensing Board concluded, Mr. Dienethal's summary listing of these concerns in his affidavit failed to establish the required causal link between the instant amendment and any injury to his interests.<sup>19</sup>

While the Amended Petition's discussion of standing and his supporting affidavit are silent with respect to these matters, Mr. Dienethal argues that it was sufficient for these matters to be

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<sup>19</sup> The Petitioner's affidavit, in paragraph 20, referred to his statement of contentions. In his contentions, Mr. Dienethal generally alleged that the instant license amendment could have some potential impact either on reactor safety or the public health and safety. *See, e.g.*, Amended Petition at 11, 12, 19, 21, 28, 36, 40. Like his statement on standing, however, many of his contentions sought to challenge decommissioning activities at the facility (which are not authorized by the instant amendment), management issues, or other concerns which, if proven, are not fairly traceable to the instant licensing action. These types of concerns are beyond the proper scope of this proceeding and would not be admissible herein. *See generally*, Policy Statement, "Policy on Conduct of Adjudicatory Proceedings," CLI-98-12, 48 NRC 18, 22 (1998) (indicating that "[t]he scope of a proceeding, and, as a consequence, the scope of contentions that may be admitted, is limited by the nature of the application and pertinent Commission regulations"); *Yankee Atomic, supra*, CLI-98-21, slip op. at 15, 16-17. Further, even if Mr. Dienethal is successful in his attempt to have the instant license amendment denied, the Licensee's management and its authority to decommission the plant would not change. Accordingly, since redress is not possible in this proceeding, these concerns cannot support Mr. Dienethal's standing to intervene with respect to the instant license amendment. *Id.*, slip op. at 23; *Public Service Co. of New Hampshire* (Seabrook Station, Unit 1), 34 NRC 261, 268 (1991).



set forth in his statement of contentions (*see, e.g.*, App. Br. at 4, 5, 6, 7) -- suggesting that the parties and Board were obliged to look beyond his discussion of standing, and to examine his contentions to determine if anything there could support his standing to intervene. While the Commission has construed a petition in favor of the petitioner in evaluating his standing to intervene,<sup>20</sup> the Commission's case law and regulations squarely place the burden upon the petitioner to establish his standing to intervene -- and the Licensing Board and parties are not obliged to reconstruct a petition to intervene in order to satisfy the petitioner's burden.

In this regard, it is fundamental that a petitioner for leave to intervene bears the burden of establishing his standing to do so. *See, e.g., Atlas Corp.* (Moab, Utah Facility), CLI-97-8, 46 NRC 21, 22 (1997); *Public Service Co. of New Hampshire* (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 266-67 (1991). Further, the Commission has indicated that parties who appear in NRC proceedings bear full responsibility for any misapprehension of their position caused by inadequacies in their pleadings. *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 143 n.17 (1993). As the Appeal Board stated long ago, the Licensing Board and parties "are entitled to be told at the outset, with clarity and precision, what arguments are being advanced and what relief is being asked . . . It should not be necessary to speculate about what a pleading is supposed to mean." *Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit No. 1), ALAB-279, 1 NRC 559, 576 (1975). This is particularly true where, as here, the Petitioner is represented by experienced counsel. *Id.* at 576-77. Accordingly, Mr. Dienethal's failure to set forth his concerns in an understandable

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<sup>20</sup> *Georgia Tech, supra*, CLI-95-12, 42 NRC at 115.

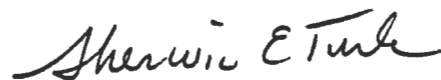
manner in support of his assertion of standing, in and of itself, warrants that no further consideration need be given to those matters.

Moreover, even if the Petitioner's contentions are deemed to sufficiently place the parties and Board on notice of these matters, they do not establish his standing to intervene, in that they fail to provide any credible or plausible showing that the removal of the Radiation Protection Person from the on-shift crew, or any other aspect of the instant amendment, could cause harm to the Petitioner's interests. *See discussion supra*, at 10-16. Thus, even if Mr. Dienethal's contentions are deemed to be a part of his discussion of standing, they fail to establish his right to intervene.

#### CONCLUSION

For the reasons set forth above, the Staff submits that the Licensing Board correctly determined that Mr. Dienethal had failed to establish his standing to intervene in this proceeding. Accordingly, the Licensing Board's decision in LBP-98-27 should be affirmed.

Respectfully submitted,

A handwritten signature in black ink, reading "Sherwin E Turk". The signature is written in a cursive, flowing style.

Sherwin E. Turk  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 1st day of December 1998

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USRC

BEFORE THE COMMISSION

'98 DEC -1 P4:54

In the Matter of )

COMMONWEALTH EDISON COMPANY )

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

Docket Nos. 50-295/304-LA

OFFICE OF THE  
SECRETARY  
ADJUDICATIONS

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S BRIEF IN RESPONSE TO THE APPEAL FILED BY EDWIN D. DIENETHAL FROM THE LICENSING BOARD'S DECISION IN LBP-98-27" 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 1st day of December 1998:

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Administrative Judge  
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Washington, DC 20555

Office of the Secretary (16)  
ATTN: Rulemakings and Adjudications  
Staff  
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Adjudicatory File (2)  
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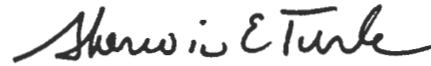
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