13026

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE NUCLEAR REGULATORY COMMISSION

In the Matter of NORTHEAST NUCLEAR ENERGY CO. (Millstone Nuclear Power Station, Unit No. 2)

Docket No. 50-336 -OLA

LICENSEE NORTHEAST NUCLEAR ENERGY COMPANY'S ANSWER TO REQUEST FOR HEARING AND PETITION TO INTERVENE BY M.J. PRAY

In accordance with 10 C.F.R. § 2.714(c), Northeast Nuclear Energy Company ("NNECO"), licensee in the captioned matter, hereby files its answer to a request for hearing and petition to intervene in response to a notice of Opportunity for Hearing published in the Federal Register on April 28, 1992 (57 Fed. Reg. 17,934) regarding a proposed license amendment. Petitioner, Michael J. Pray, filed a nontimely request for a hearing and petition for intervention. The petition also seeks an environmental impact study under the National Environmental Policy Act. Contrary to the instructions at 57 Fed. Reg. 17,935, the petition was not sent to NNECO's counsel.1/

Petitioner does not meet the requirements for entitling Petitioner to a hearing and intervention, as set forth in the notice and 10 C.F.R. § 2.714. Moreover, the petition is late without good cause. Therefore, NNECO requests that the request for a hearing and petition to intervene be denied.

1/ The petition was forwarded to NNECO's counsel by the NRC on June 11, 1992.

D503

II. BACKGROUND

On April 16, 1992, NNECO proposed a Technical Specification amendment to govern its use of the spent fuel pool at Millstone Unit No. 2 ("Unit 2"). This amendment will modify the existing two-region spent fuel pool design to a three-region configuration. On April 28, 1992, the Staff proposed a determination that the amendment request involves "no significant hazards consideration," and (consistent with 10 C.F.R. §§ 2.105 and 50.91) published a notice of Opportunity for Hearing.[2/] The notice required that written requests for hearing and petitions for leave to intervene in accordance with 10 C.F.R. § 2.714 be filed by May 28, 1992. The notice also stated that:

> Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission . . . that the petition and/or request should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1)(i)-(v) and 2.714(d).

57 Fed. Reg. at 17,935.

In response to the notice, Petitioner filed with the Commission, by letter postmarked June 3, 1992, a request for a hearing and petition to intervene with the Commission. On June 4, 1992, the Staff made all appropriate findings, including a final

---

2/ "Northeast Nuclear Energy Co.; Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for Hearing," 57 Fed. Reg. 17,934 (1992).

"no significant hazards consideration" finding and issued the requested Technical Specification amendment in accordance with 10 C.F.R. § 50.91(a)(4).[3/]

NNECO is filing this Answer to the request for hearing and petition to intervene pursuant to 10 C.F.R. § 2.714(c), which provides that a party to a proceeding may file an answer to a petition to intervene within ten days after service. Petitioner served his document on the NRC by U.S. Mail postmarked June 3, 1992. The NRC provided NNECO with a copy on June 11. If the document had been served on NNECO by mail on June 3, 10 C.F.R. § 2.710 would have provided NNECO with five days in addition to the ten days provided by 10 C.F.R. § 2.714(c) to answer the petition. Thus, a timely response to service on June 3 would have been June 18, 1992, but ten days from actual receipt is June 22, 1992.

3/ "Safety Evaluation by the Office of Nuclear Reactor Regulation Related to Amendment No. 158 to Facility Operating License No. DPR-65, Northeast Nuclear Energy Company, Et Al. Millstone Nuclear Power Station, Unit No. 2 Docket No. 50-336," June 4, 1992, ("SER") at 5-6.

III. DISCUSSION

A. The General Requirements of 10 C.F.R. § 2.714

The published notice of opportunity for hearing requires that "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 10 CFR Part 2." 57 Fed. Reg. 17,934. Pursuant to 10 C.F.R. § 2.714(a):

> (1) Any 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.
>
> * * * *
>
> (2) The petition shall set forth with particularity the interest of the petitioner in the proceeding, 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 paragraph (d)(1) of this section, and the specific aspect or aspects of the subject of the proceeding as to which petitioner wishes to intervene.

Pursuant to 10 C.F.R. § 2.714(d)(1), a petition for leave to intervene must address 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.

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

These factors govern a petitioner's standing to intervene. The NRC applies contemporaneous judicial concepts of standing to determine whether a petitioner has sufficient interest in a proceeding to be entitled to intervene as a matter of right. Public Service Company of New Hampshire (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 266 (1991); Florida Power & Light Company (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91-13, 34 NRC 185, 187 (1991). "These concepts require a showing that (a) the action will cause 'injury in fact,' and (b) the injury is arguably within the 'zone of interests' protected by the statute governed by the proceeding." Metropolitan Edison Company, et al. (Three Mile Island Nuclear Station, Unit No. 1), CLI-83-25, 18 NRC 327, 332 (1983). The NRC has periodically reaffirmed these requirements for intervention, more recently, for example, in Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992).

As the Licensing Board in The Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Unit No. 1), LBP-92-4, 35 NRC ____, (March 18, 1992), slip op. at 12, discussed these standards, they require that:

[T]he asserted injury must be "distinct and palpable"[30] and "particular [and] concrete,"[31] as opposed to being "'conjectural . . . [,] hypothetical'"[32] or "abstract."[33] . . . Additionally, there must be a causal nexus between the asserted injury and the challenged action.

---

30 Warth v. Seldin, 422 U.S. 490, 501 (1975).
31 United States v. Richardson, 418 U.S. 166, 177 (1974).
32 Los Angeles v. Lyons, 461 U.S. 95, 102 (1983).
33 Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. [26] at 40.

B. Proximity of Residence to the Plant is an Inadequate Basis for Standing in an Operating License Amendment Proceeding

This proceeding is a license amendment proceeding within the meaning of Atomic Energy Act § 189a(1) (42 U.S.C. § 2239(a)(1)). While a petitioner's residence within fifty miles of a power reactor may support a finding of standing in an operating license proceeding, Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1433-35 (1982), standing to intervene in a license amendment proceeding requires a more particularized showing of harm or injury and does not permit the petitioner to rest on the mere presumption that residence within fifty miles of the reactor creates standing.

As the Commission noted in the St. Lucie proceeding on an exemption which was noticed for opportunity for a hearing, cases conferring standing based on a specific distance from the plant "involved the construction or operation of the reactor itself, with clear implications for the offsite environment, or major alterations to the facility with a clear potential for offsite

consequences." Florida Power & Light Company (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989). The Commission contrasted such cases with those involving minor license amendments such as the one here: "Absent situations involving such obvious potential for offsite consequences, a petitioner must allege some specific 'injury in fact' that will result from the action taken . . . ." Id. at 329-30 (emphasis added). Licensing boards have consistently interpreted this opinion to eliminate the presumption of standing based on residence within fifty miles of the plant in license amendment cases such as this. For example, the Licensing Board in Shoreham held:

> The Commission does not allow the [fifty mile] presumption to be applied to all license amendments. It only does so in those instances involving an obvious potential for offsite consequences. Those include applications for construction permits, operating licenses or significant amendments thereto such as the expansion of the capacity of a spent fuel pool. Those cases involve the operation of the reactor itself, or major alterations to the facility with a clear potential for offsite consequences. Absent situations with obvious potential for offsite consequences, a petitioner must allege some specific injury in fact that will result from the action taken.

Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC 179, 186 (1991). In other words, because a petitioner in an operating license amendment proceeding such as this is not entitled to rely upon the presumption of standing in an operating license case, he is obliged to demonstrate compliance

with the three-fold requirements under 10 C.F.R. § 2.714(d) to demonstrate his interest in the proceeding.

The Commission's adjudicatory boards have applied this principle in a number of proceedings involving operating license amendments for changes to spent fuel pool operations. In Virginia Electric & Power Company (North Anna Power Station, Units 1 and 2), ALAB-790, 20 NRC 1450 (1984), the Appeal Board upheld the denial of a request for hearing and intervention regarding an amendment to expand the capacity of the North Anna spent fuel pool to accommodate the receipt of assemblies from a sister plant. The Appeal Board held that the petition it rejected was not based upon "a particularized claim that the modification of the North Anna spent fuel pool might pose a health and safety risk to [the intervenor's] members or have a significant environmental impact." Id. at 1453. Without regard to the residence of any of the petitioning organization's members, the Appeal Board simply observed that the proposed amendment entailed no "significant safety or environmental implications," such that "the undertaking of the [spent fuel pool] modification at this time perforce could occasion no harm to the organization or its members." Id. at 1454.

In a later case involving a license amendment to change the permissible maximum K_{eff} of the fuel pool from 0.90 to 0.95, the Licensing Board held that:

> This case concerns a request for a license amendment and is not controlled by the same standing considerations

> that govern standing when an operating license is sought. Whatever the risk to the surrounding community from a reactor *and* its associated fuel pool, the risk from the fuel pool alone is less and the distance of residence from the pool for which standing would be appropriate would, accordingly, be less. Consequently, we do not consider residence 43 miles from this plant to be adequate for standing.

Boston Edison Company (Pilgrim Nuclear Power Station), LBP-85-24, 22 NRC 97, 99 (1985), aff'd on other grounds, ALAB-816, 22 NRC 461 (1985). Thus, the risk of harm or injury necessary to support a finding of standing is a function of the potential consequences associated with the new activity licensed by the amendment. The Board applied a two-tiered approach for determining standing to challenge a fuel pool amendment: Is there an accident scenario involving the fuel pool that could affect the petitioner? If so, would the proposed amendment arguably increase the risk to the petitioner? Under this approach, if either answer were in the negative, the petitioner lacks sufficient interest in the proceeding to confer standing.

In the Perry amendment proceeding noted above, the Licensing Board similarly denied a petition to intervene because "the instant licensing action has no effect on any of the petitioner's asserted interests in preserving her life, health, livelihood, property or the environment. . . . [I]njury to individuals living in reasonable proximity to a plant must be based on a showing of 'a clear potential for offsite consequences' resulting from the challenged action." Perry, LBP-92-4, slip op. at 15-16 (March 18, 1992) (citing St. Lucie, CLI-89-21, 30 NRC at 329.) The

petitioner in that case lived within 15 miles of the nuclear power plant.

C. Standing for Organizations

An organization may establish standing to participate either as an organization or as a representative of one or more members. Houston Lighting & Power Company (Allens Creek, Unit 1), ALAB-535, 9 NRC 377 (1979). See also Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118 (1987). In general, to establish organizational standing, the petitioner must demonstrate that the organization itself or its members will be injured, and that the injury is not a generalized grievance shared by all or a large class of citizens. Vermont Yankee at 118.

To establish standing as the representative of members who themselves have an interest in the proceeding, the petitioner must, among other things, identify the member(s) having the interest and must provide concrete evidence (such as an affidavit) that the member(s) wishes to be represented by the organization. Id. Also, the organization must demonstrate that it has authorized a particular representative to represent the organization in the proceeding. Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2), LBP-90-29, 32 NRC 89, 92 (1990).

D. Requirements of 10 C.F.R. § 2.714 Regarding Nontimely Petitions

As noted above, the published notice and regulations are clear that a nontimely petition will not be entertained absent a determination that the request should be granted based on a balancing of the factors of 10 C.F.R. §§ 2.714(a)(1)(i)-(v) and 2.714(d). The factors of section 2.714(d) have been listed above. The factors of section 2.714(a)(1)(i)-(v) are:

> (i) Good cause, if any, for failure to file on time.
>
> (ii) The availability of other means whereby the petitioner's interest will be protected.
>
> (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
>
> (iv) The extent to which the petitioner's interest will be represented by existing parties.
>
> (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

A late petition to intervene which does not even discuss these criteria must be denied. Duke Power Company (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350 (1980). Good cause for lateness is the most important factor and, where good cause is lacking, a petition must make a compelling showing on the other factors. Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 397 (1983) (citing Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1765 (1982)). Moreover, a

petitioner has a duty to confront the five lateness factors in his or her petition; the petitioner cannot wait until the licensee or Staff raises lateness as grounds for denying the petition. Boston Edison Company (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 466 (1985).

E. Petitioner Does Not Meet the Requirements for Standing to Intervene

An application of the above-stated principles regarding interest to Petitioner's letter requesting a hearing and petitioning to intervene demonstrates that the request and petition should be denied. Petitioner has not demonstrated an interest in the proceeding sufficient to be granted intervenor status.

Petitioner does not set forth with particularity his interest in the proceeding, how that interest may be affected by the results of the proceeding, and the reasons why he should be permitted to intervene. Therefore, the Commission cannot affirmatively find such interest to exist. Moreover, such an interest may not, for the reasons discussed above, be inferred merely from the distance to Petitioner's residence from Unit 2, which is approximately 4.4 miles.4/

As shown by the Commission's precedents, mere proximity to Millstone Unit 2 is insufficient interest to confer standing. First, there is no causal nexus between any asserted injury and

---

4/ This estimated distance is based on the address on Petitioner's letter.

the license amendment at issue. Even though some postulated design basis fuel pool scenarios could expose a person over 4 miles from Unit 2 to radioactive releases from the fuel pool that could exceed 10 C.F.R. Part 20 limits for normal operations,[5/] Petitioner has not alleged that the instant amendment could increase the risk of injury from these postulated scenarios. Petitioner has alleged in his letter that "a spent fuel pool accident resulting in the release of radioacti[vi]ty to the air" would contaminate his family's source of drinking water, "would make it difficult to find uncontaminated food or soil," and would affect the value of his property. However, Petitioner has not shown a nexus between these alleged injuries and the instant amendment.

In its "no significant hazards consideration" determination, the NRC Staff concluded that the Technical Specification amendment in question would not result in (1) a reduction in the margin of safety, (2) the possibility of a new or different kind of accident or (3) a significant increase in the probability or consequences of an accident previously evaluated.[6/] This reflects that the amendment simply imposes additional restrictions on the use of the Unit 2 spent fuel pool. While this analysis in not binding on Petitioner, it puts in perspective his complete failure to assert

---

5/ Based on NNECO's calculations, the postulated fuel handling and cask drop accidents would be the most severe fuel pool accidents. (See Unit 2 FSAR section 14.7.4.3.1 and Table 14.7.4-1.)

6/ SER at 5-6.

any harm or injury which could result from the Technical Specification change issued in the amendment. Thus, even though accident scenarios exist which could affect a resident at a distance of about 4 miles from Unit 2, Petitioner has alleged no way that the proposed license amendment increases his risk from such hypothetical accidents.

For the reason that Petitioner's claim to standing derives solely from his proximity to Unit 2, and that the amendment in question does not change the risk to Petitioner from the operation of Millstone Unit 2 as already licensed, Petitioner does not have standing to intervene.

F. Petitioner Has Not Justified The Granting of His Nontimely Petition

May 28, 1992, is the date cited in the notice for a timely request for a hearing and petition to intervene. 57 Fed. Reg. 17,934. To meet this date, Petitioner should have mailed his request no later than May 28. See 10 C.F.R. § 2.701(c). In fact, Petitioner mailed his request on June 3, 1992, in which case the balancing test of 10 C.F.R. § 2.714(a)(1) comes into play.

Petitioner has made no showing of good cause for failure to file on time, nor has Petitioner even discussed the five lateness factors. Therefore, Petitioner has not met the requirements of the notice as set forth in 10 C.F.R. § 2.714(a)(1) and the case law discussed above, and should not be permitted to intervene.

G. Petitioner Is Not Represented by an Organization

In his letter, Petitioner states that he is a member of the Co-operative Citizen's Monitoring Network ("CCMN"), and that he has authorized the CCMN to represent him. However, CCNM has not requested a hearing nor has it petitioned to intervene. (M.E. Marucci, coordinator for CCMN, requested a hearing and petitioned to intervene as an individual, not as a representative of CCMN, by letter dated May 28, 1992.) Thus, although Petitioner's letter could be considered authorization for CCMN to represent him, it does not constitute a request for hearing and petition by CCMN as an organization. Therefore, Petitioner's request and petition may not be considered a request for a hearing by CCMN.

H. The Commission Need Not Reach Petitioner's Request For An Environmental Assessment

Petitioner's letter requests that "an environmental impact study be completed to examine the effects of high-level waste storage in the pools at Millstone." The NRC has already addressed this issue and has determined that, "[p]ursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared in connection with the issuance of the amendment." NNECO concurs with the NRC's determination. Inasmuch as no contentions have yet been filed (see 10 C.F.R § 2.714(b) NNECO reserves its argument on the point until an appropriate contention has been filed. Because Petitioner lacks standing and

his petition is late, there will be no occasion for filing of contentions, therefore, the Commission need not address this issue.

IV. CONCLUSION

This license amendment merely increases restrictions on the use of the spent fuel pool and does not result in new accidents, increased risk to Petitioner or increased consequences of accidents. Because of the restrictive nature of this amendment, the risk to Petitioner from postulated design basis fuel pool accident scenarios will not be affected.

Petitioner has not demonstrated sufficient interest to confer standing to intervene as a party, nor has Petitioner demonstrated that the CCMN, of which he is a member, has requested a hearing or petitioned to intervene as an organization. Further, Petitioner's request is nontimely and no good cause for lateness has been given. In fact, Petitioner has not addressed, much less met, the five factors for a late petition. Therefore, Petitioner's request for a hearing and petition to intervene should be denied.

NORTHEAST NUCLEAR ENERGY CO.

John L. Mac K for
Nicholas S. Reynolds

WINSTON & STRAWN,
ATTORNEYS FOR NORTHEAST NUCLEAR ENERGY COMPANY

June 18, 1992

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE NUCLEAR REGULATORY COMMISSION

In the Matter of NORTHEAST NUCLEAR ENERGY CO. (Millstone Nuclear Power Station, Unit No. 2)	Docket No. 50-336

CERTIFICATE OF SERVICE

I hereby certify that copies of "Northeast Nuclear Energy Company Answer to Request for Hearing and Petition to Intervene by M.J. Pray," dated June 18, 1992, have been served on this 18th day of June, 1992, as follows:

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Attention: Chief, Docketing and Service Section

By first class mail
Original plus 2 copies

B. Paul Cotter, Jr.
Chief Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

By first class mail
1 copy

Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

By first class mail
1 copy

Richard M. Kacich
Northeast Utilities
P.O. Box 270
Hartford, Connecticut 06101

By first class mail
1 copy

Michael J. Pray
87 Blinman Street
New London, CT 06320

By first class mail
1 copy

Gerald Garfield, Esq.
Day, Berry & Howard
City Place
Hartford, CT 06103-3499

By first class mail
1 copy

NORTHEAST NUCLEAR ENERGY CO.

John A. MacEvoy

WINSTON & STRAWN,
ATTORNEYS FOR NORTHEAST NUCLEAR
ENERGY CO.

June 18, 1992