

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION '98 JUN 10 P4:04

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)
)
NORTHEAST NUCLEAR ENERGY COMPANY)
)
(Millstone Nuclear Power Station,)
Unit No. 3)

Docket No. 50-423-LA-2

NRC STAFF'S RESPONSE TO CITIZENS REGULATORY
COMMISSION'S PETITION TO INTERVENE

INTRODUCTION

Pursuant to 10 C.F.R. § 2.714(c), the staff of the Nuclear Regulatory Commission (Staff) hereby responds to the May 21, 1998 petition for leave to intervene filed by the Citizens Regulatory Commission (CRC).¹ For the reasons set forth below, the Staff submits that CRC has not demonstrated its standing to intervene in this matter, as required by 10 C.F.R. § 2.714; accordingly, its petition for leave to intervene should be denied.

BACKGROUND

On April 1, 1998, Northeast Nuclear Energy Company (NNECO) submitted a request for a license amendment pursuant to 10 C.F.R. § 50.90 for Millstone Nuclear Power Station, Unit No. 3. On April 22, 1998, the NRC published a *Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing*. 63 Fed. Reg. 19964-19966, 19974-19975.

¹ Citizens Regulatory Commission Petition for Leave to Intervene (Petition).

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The Notice provided a description of the amendment request:

The proposed revision to the Millstone Unit 3 licensing basis would add a new sump pump subsystem to address groundwater inleakage through the containment basemat.

63 Fed. Reg. 19974.

The Notice further provided that by May 22, 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. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's 'Rules of Practice for Domestic Licensing Proceedings' in 10 C.F.R. Part 2.

Id. at 19965.

As stated above, on May 21, 1998, CRC filed its Petition with the Commission. On June 1, 1998, an Atomic Safety and Licensing Board (Board) was established to preside over the proceeding. For the reasons set forth below, CRC has not met the standing requirements of 10 C.F.R. § 2.714. CRC's Petition should, therefore, be denied.

DISCUSSION

A. Legal Requirements for Intervention.

Any person or entity who requests a hearing or seeks to intervene in a Commission proceeding must demonstrate that it has standing to do so. Section 189a(1) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2239(a) (the Act or AEA), provides:

In any proceeding under this Act, for the granting, suspending, 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 set forth in [§ 2.714(d)(1)]." Pursuant to 10 C.F.R. § 2.714(d)(1), in ruling on a petition for leave to intervene or a request for 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.

Finally, a petition for leave to intervene must set forth "the specific aspect or aspects of the subject matter of the proceeding as to which the petitioner wishes to intervene." 10 C.F.R. § 2.714(a)(2). An "aspect" is broader than a "contention" but narrower than a general reference to the Commission's operating statutes. *Consumers Power Co.* (Midland Plant, Units 1 & 2), LBP-78-27, 8 NRC 275, 278 (1978). A Board lacks jurisdiction to consider an intervention petition in which the aspect of the proposed intervention is not within the scope of the proceeding. *Philadelphia Electric Co.* (Limerick Generating Station, Unit 1), LBP-86-9, 23 NRC 273, 277 (1986).

In determining whether a petitioner has established the requisite interest, the Commission applies contemporaneous judicial concepts of standing. *Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47 (1994). In order to establish standing, a petitioner must show that the proposed action will cause "injury in fact" to the petitioner's interest and that the injury is

arguably within the "zone of interests" protected by the statutes governing the proceeding. *Id.* In Commission proceedings, the injury must fall within the zone of interests sought to be protected by the AEA or the National Environmental Policy Act. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 316 (1985). The alleged interest must be concrete and particularized, fairly traceable to the challenged action, and likely to be redressed by a favorable decision. *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 32 (1993) citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). To establish injury in fact and 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 determination that the injury is fairly traceable to the challenged action does not depend "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). Finally, it must be likely, rather than speculative, that a favorable decision will redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561; (1992); *Sequoyah Fuels*, 40 NRC at 71-72.

In order for an organization to establish standing, it must either demonstrate standing in its own right or claim standing through one or more individual members who have standing. See *Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995). Thus, an organization may meet the injury in fact test either (1) by showing an effect upon its organizational interests, or (2) by showing that at least one of its members would suffer injury as

a result of the challenged action, sufficient to confer upon it "derivative" or "representational" standing. *Houston Lighting and Power Co.* (South Texas Project Units 1 and 2), ALAB-549, 9 NRC 644, 646-47 (1979), *aff'g* LBP-79-10, 9 NRC 439, 447-48 (1979). An organization seeking to intervene in its own right must demonstrate a palpable injury in fact to its organizational interests that is within the zone of interests protected by the Atomic Energy Act or the National Environmental Policy Act. *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 528-30 (1991). Where the organization relies upon the interests of its members to confer standing upon it, the organization must show that at least one member who would possess standing in his individual capacity has authorized the organization to represent him. *Georgia Institute of Technology*, 42 NRC at 115; *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 393-94, 396 (1979).

B. CRC Has Failed to Establish Standing to Intervene

CRC has failed to establish its standing to intervene in this proceeding in that (1) it has not identified members of CRC who have authorized CRC to represent them;² (2) it has not shown an "injury in fact" to its interests or an interest of its members that is fairly traceable to the license amendment request; (3) it has not set forth any aspect of the proposed intervention that is within the scope of the proceeding.

With regard to its members, CRC merely states that it "includes members who reside with their young children within the five-mile priority emergency evacuation zone of the Millstone Station." Petition at 1. This statement is totally insufficient to fulfill the requirement of identifying a member with individual standing who has authorized CRC to represent him.

² It does not appear that CRC is asserting organizational standing.

Second, CRC has not even *alleged*, much less shown, an injury in fact that would be caused by the issuance of the amendment. This amendment, if approved, will change the Millstone Unit 3 licensing basis to include a new sump pump subsystem to address groundwater leakage through the containment basemat. The basis for NNECO's license amendment request is 10 CFR 50.59(c), which requires an application for a license amendment to be submitted for, *inter alia*, a change in the facility as described in the safety analysis report when the change involves an unreviewed safety question as defined in 10 CFR 50.59(a)(2). As stated in NNECO's April 1, 1998 license amendment request, a Millstone Unit 3 configuration management program review revealed that leakage of groundwater has the potential to flood engineered safety features (ESF) building sumps if the existing nonsafety-related sump pumps fail to operate. If the sumps are not pumped out, the groundwater could eventually affect both trains of the recirculation spray system (RSS).³ In the past, the Millstone Unit 3 licensing basis credited a waterproof membrane, which is encased in the containment substructure, to protect the structure from the effects of groundwater leakage. However, degradation of the waterproof membrane has been detected, allowing groundwater leakage. To address the issue of groundwater leakage, two safety-related, air-driven sump pumps were installed in the sumps. Section 50.59(a)(1) permits such a change without prior Commission approval unless the change involves an unreviewed safety question. NNECO determined that the change involved an unreviewed safety question and submitted the license amendment request at issue.

As noted in the *Federal Register* notice, the amendment is a "proposed revision to the Millstone Unit 3 licensing basis." 63 Fed. Reg. at 19974. In other words, the amendment would permit NNECO to revise its FSAR to include a new sump pump subsystem to address groundwater

³ The RSS system is part of the Millstone Unit 3 emergency core cooling system.

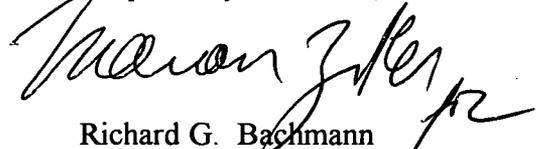
inleakage through the containment basemat. CRC has made no showing of an injury to it or any of its members as a result of this revision to the FSAR.

Finally, CRC has not set forth any aspects of the subject matter of the proceeding which are within the scope of the proceeding. CRC states nineteen "objections" to the requested amendment. Petition at 2-5. Assuming these "objections" were meant to be considered as aspects, none of them are within the scope of this proceeding, *i.e.*, whether NNECO may amend the Millstone Unit 3 license in order to revise the FSAR to address the new sump pump subsystem.

CONCLUSION

CRC has failed to establish its standing to intervene in this proceeding by not identifying members of CRC who have authorized CRC to represent them; by not showing an "injury in fact" to its interests or an interest of its members; and by not setting forth any aspect of the proposed intervention that is within the scope of the proceeding. Therefore, CRC's Petition should be denied.

Respectfully submitted,



Richard G. Bachmann
Counsel for NRC Staff

Dated at Rockville, Maryland
this 10th day of June 1998

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NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S RESPONSE TO CITIZENS REGULATORY COMMISSION'S PETITION TO INTERVENE" 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 10th day of June, 1998:

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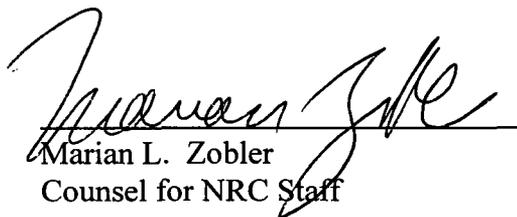
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