LBP-98-24



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<br><br>COMMONWEALTH EDISON COMPANY<br><br>(Zion Nuclear Power Station, Units 1 and 2) | Docket Nos. 50-295/304-LA-2<br><br>ASLBP No. 98-750-06-LA<br><br>October 5, 1998 |

MEMORANDUM AND ORDER
(Dismissing Intervention Petition)

On August 18, 1998, Mr. Edwin D. Dienethal, Mr. Randy Robarge, and the Committee for Safety at Plant Zion ("Joint Petitioners") filed a petition to intervene in connection with the July 24, 1998 no significant hazards consideration finding made by the NRC Staff regarding the license amendment application of Commonwealth Edison Company ("Applicant") for its Zion Nuclear Power Station, Units 1 and 2. This Licensing Board was established on September 1, 1998, to preside over the proceeding initiated by the intervention petition.

On September 2, 1998, the Licensing Board directed the Joint Petitioners to show cause by September 11, 1998 why their petition should not be dismissed as precluded by 10 C.F.R. §

50.58(b)(6). That regulation specifically prohibits any hearing on, or review of, the Staff's no significant hazards determination, except upon the Commission's own initiative. The Applicant and the Staff were ordered to file responses to the Joint Petitioners' filing by September 21, 1991. For the reasons set forth below, the Joint Petitioners' intervention request is dismissed.

## I. Background

The Applicant filed a license amendment application on March 30, 1998 to make certain changes to the operating licenses for the two Zion plants in order to facilitate plant activities following defueling and the permanent shutdown of the facility. Thereafter, on May 6, 1998, the NRC published a notice of opportunity of hearing for the license amendment application. See 63 Fed. Reg. 25,101 (1998). That notice was part of the Commission's regular biweekly listing of applications and amendments to facility operating licenses involving no significant hazards considerations, in this instance for the period of April 10 to April 24, 1998. It indicated that the Commission, inter alia, had made a proposed determination that the Commonwealth Edison Company's amendment request involved no significant hazards consideration. Id. at 25,105-06. The notice also invited the filing of public comments within 30 days on the proposed no significant hazards consideration determination and stated that such comments "will be considered in making any final

determination." Id. at 25,101. Next, it explained that the Commission normally does not issue a license amendment until the expiration of the 30-day comment period on the proposed no significant hazards consideration determination but that the Commission retained the authority to do so if circumstances warranted such action. Id. at 25,101-02. Finally, the May 6, 1998 notice stated that any person whose interest may be affected by the license amendment and who wished to participate in the proceeding on the amendment application must file a written request for a hearing and a petition to intervene by June 5, 1998. Id. at 25,102.

In response to the May 6, 1998 notice of opportunity for hearing, one of the three Joint Petitioners in the instant proceeding, Edwin D. Dienethal, filed a timely petition to intervene seeking to challenge the Applicant's license amendment request. A Licensing Board was established on June 11, 1998 to rule upon the Dienethal petition and preside over that proceeding. Thereafter, in a communication served upon all participants in that pending proceeding as part of Board Notification 98-01 (Aug. 4, 1998), the Staff informed the Commission of its intent to make a final no significant hazards consideration determination and to issue the license amendments for the Zion facility. On August 12, 1998, the Commission published notice of the issuance of the Zion license amendments. See 63 Fed. Reg. 43,200, 43,217 (1998). That notice was part of

another NRC biweekly notice of applications and amendments to facility operating licenses involving no significant hazards considerations. In a section of the notice set out in bold typeface and entitled "Notice of Issuance of Amendments to Facility Operating Licenses," the notice set forth the name of the utility applicant, the date of the amendment application, a description of the amendments, the July 24, 1998 date the amendments were issued, and the May 6, 1998 date and citation of the initial Federal Register notice. Further, the notice indicated that the NRC had received no comments on the Staff's proposed no significant hazards consideration determination. Id. at 45,216-17.

In the August 18, 1998 petition now before us seeking to intervene in the matter of the Commission's final no significant hazards consideration determination, the Joint Petitioners claim that the Commission's August 12, 1998 Federal Register notice announcing the issuance of the license amendments for the Zion facility provided an opportunity for persons interested in the finding to file an intervention petition by September 11, 1998. Additionally, in responding to the Licensing Board's order directing them to show cause why their petition should not be dismissed as precluded by 10 C.F.R. § 50.58(b)(6), the Joint Petitioners argue that section 50.58(b)(6) is not controlling here because that regulation only precludes review of NRC Staff no significant hazards consideration determinations, not those

determinations made by the Commission. The Joint Petitioners assert that 10 C.F.R. § 2.105(a)(4)(i) provides an exception to section 50.58(b)(6) and that provision applies in those situations when, as here, the Commission makes the no significant hazards consideration determination with respect to the amendment of a Class 104 license issued under 10 C.F.R. § 50.21(b). The Joint Petitioners argue, therefore, that they have a right to a hearing on the no significant hazards consideration determination noticed in the August 12, 1998 Federal Register.

In their responses, the Applicant and the Staff both argue that the Joint Petitioners have misapprehended the Commission's August 12, 1998 Federal Register notice and that that notice did not provide any opportunity for a hearing on the Staff's final no significant hazards consideration determination. Similarly, they both assert that 10 C.F.R. § 50.58(b)(6) expressly prohibits petitions to intervene in no significant hazards consideration determinations and that the Joint Petitioners characterization of section 50.58(b)(6) and 10 C.F.R. § 2.105(a)(4)(i) is simply wrong.

## II. Analysis

The Applicant and the Staff are correct that 10 C.F.R. § 50.58(b)(6) stands as a bar to the Joint Petitioners' intervention petition seeking to challenge the Staff's final no significant hazards consideration determination. That regulation provides:

> No petition or other request for review of or hearing on the staff's significant hazards consideration determination will be entertained by the Commission. The staff's determination is final, subject only to the Commission's discretion, on its own initiative, to review the determination.

10 C.F.R. § 50.58(b)(6). This regulatory prohibition is clear and unequivocal. The Licensing Board has no jurisdiction to consider an intervention petition seeking to challenge a Staff's final no significant hazards consideration determination. Only the Commission has the discretion upon its own motion to review such a final finding. See 51 Fed. Reg. 7744, 7759 (1986) (statement of consideration on final rule) ("To buttress this point, the Commission has modified § 50.58(b)(6) to state that only it on its own initiative may review the staff's final no significant hazards consideration determination.")

As the Licensing Board in Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC 179, 183 (1991), stated:

> A determination of no significant hazards consideration is not a substantive determination of public health and safety issues for the hearing on the proposed amendment. The only effect of such a determination on the hearing is to establish whether the amendment may be approved before a hearing is held or, if there is a finding of significant hazards consideration, a final decision must await the conclusion of the hearing.
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> Commission regulation is very clear that a Licensing Board is without authority to review Staff's significant hazards

> consideration determination. 10 C.F.R. § 50.58(b)(6).

Accord Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-90-6, 31 NRC 85, 90-91 (1990). Because section 50.58(b)(6) deprives the Licensing Board of jurisdiction to entertain the Joint Petitioners' intervention petition seeking to challenge the Staff's final no significant hazards consideration determination, the petition must dismissed.

The Joint Petitioners' assertion that the Commission's notice in the August 12, 1998 Federal Register invited the filing of intervention petitions on the Staff's no significant hazards consideration determination and provided an opportunity for hearing on that finding is simply incorrect. No reasonable reading of the entire notice leads to that conclusion. Indeed, even a casual and cursory reading of the notice does not lead to that conclusion. The August 12, 1998 notice did nothing more than announce the issuance of the license amendments for Commonwealth Edison Company's Zion plants. The notice did not provide a new opportunity for hearing on the Zion license amendments or invite new public comments on the Staff's no significant hazards consideration determination. The Commission's earlier May 6, 1998 Federal Register notice, 63 Fed. Reg. 25,101 (1998), did both those things. And, contrary to the Joint Petitioners' unfounded and erroneous assertion, the August 12, 1998 notice did not invite the filing of intervention

petitions on the Staff's final no significant hazards consideration determination or provide an opportunity for hearing on that finding. The Joint Petitioners' argument in this regard is totally without merit.

Equally without merit is the Joint Petitioners' argument that 10 C.F.R. § 2.105(a)(4)(i) provides an exception to the prohibition contained in section 50.58(b)(6) for those no significant hazards consideration determinations made by the Commission itself for amendments to Class 104 licenses issued under 10 C.F.R. § 50.21(b). Contrary to the Joint Petitioners claim, section 2.105(a)(4)(i) provides no exception to the prohibition in section 50.58(b)(6) against challenges to the NRC's final no significant hazards consideration determination. The former section contains the notice provisions that parallel the Commission's regulations found in 10 C.F.R. §§ 50.91 and 50.92 for issuing immediately effective license amendments. That provision states:

> (a) If a hearing is not required by the Act or this chapter, and if the Commission has not found that a hearing is in the public interest, it will, prior to acting thereon, cause to be published in the FEDERAL REGISTER a notice of proposed action with respect to an application for:
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> . . . .
>
> (4) An amendment to an operating license for a facility licensed under § 50.21(b) or § 50.22 of this chapter or for a testing facility, as follows:

> (i) If the Commission determines under § 50.58 of this chapter that the amendment involves no significant hazards consideration, though it will provide notice of opportunity for a hearing pursuant to this section, it may make the amendment immediately effective and grant a hearing thereafter[.]

10 C.F.R. § 2.105(a)(4)(i).

This provision merely describes the manner in which the Commission provides public notice of its proposed action on a license amendment application and the opportunity to petition for a hearing on the amendments. By its terms, section 2.105(a)(4)(i) creates no independent right to a hearing on the Staff's no significant hazards consideration determination. Nor is there any significance to the Joint Petitioners' reliance upon the fact that the underlying licenses at issue are Class 104 licenses. Under 10 C.F.R. § 2.105, the notice requirements for amendments to Class 104 licenses issued under 10 C.F.R. § 50.51(b) are the same as the notice requirements for amendments to Class 103 licenses -- the other class of Commission licenses -- issued under 10 C.F.R. § 50.22. Similarly, in the circumstances presented, the Joint Petitioners' asserted distinction between those actions taken by the Commission and actions taken by the Staff is meaningless because the Staff, pursuant to a delegation of authority, is acting for the Commission in making the proposed and final no significant hazards consideration determination.

## III. Conclusion

The Commission's regulations, 10 C.F.R. § 50.58(b)(6), prohibit the Licensing Board from entertaining the Joint Petitioners' intervention petition seeking to challenge the Staff's July 24, 1998 final no significant hazards consideration determination. Accordingly, the petition is dismissed and the proceeding is terminated.

Pursuant to 10 C.F.R. § 2.714a, the Joint Petitioners, within 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

Dr. Jerry R. Kline
Administrative Judge

Frederick J. Shon
Administrative Judge

Rockville, Maryland
October 5, 1998

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMO & ORDER (LBP-98-24) 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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Docket No.(s)50-295/304-LA-2
LB MEMO & ORDER (LBP-98-24)

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

Adrian T. Byrdsong
Office of the Secretary of the Commission