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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION '92 JUL 29 P12:03

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ivan W. Smith, Chairman
Dr. Charles N. Kelber
Dr. Jerry R. Kline

SERVED JUL 29 '92

In the Matter of NORTHEAST NUCLEAR ENERGY COMPANY (Millstone Nuclear Power Station, Unit No. 2)	Docket Nos. 50-336-OLA FOL No. DPR-65 (ASLBP No. 92-665-02-OLA) (Spent Fuel Pool Design)

July 29, 1992

MEMORANDUM AND ORDER
(Establishing Pleading Schedule)

Synopsis

This proceeding involves a license amendment for the recently redesigned spent fuel pool at Millstone Unit 2. The Board is considering several petitions for leave to intervene and requests for hearing in response to the Federal Register notice of the amendment application (57 Fed. Reg. 17,934, April 28, 1992).[1]

[1]Initially petitions were filed by Mary Ellen Marucci (undated), Earthvision, Inc. (dated May 27, 1992), and Michael J. Pray (dated May 29, 1992). In addition Ms. Marucci and others filed on behalf of Cooperative Citizens' Monitoring Network (CCMN) on June 23, 1992. Rosemary Griffiths, on June 29, 1992, and Joseph M.

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The NRC Staff and the Licensee opposed early petitions on the grounds that they do not demonstrate standing to intervene and on other grounds. They have not yet answered later-filed petitions.[2]

Because the NRC rules of practice provide very broad opportunities to amend and to supplement intervention petitions, the Board has decided to defer rulings on intervention status until the final round of pleadings has been filed.

In this order we set a schedule for the filing of amended and supplemental petitions to intervene and answers to such petitions. In addition, to aid the Board in ruling on petitions, we request the Petitioners, the NRC Staff and the Licensee to address specified questions concerning standing to intervene.

Background

In Licensee Event Report 92-003-00, dated March 13, 1992, Northeast Nuclear Energy Company (Licensee) reported

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Sullivan, on July 6, 1992, filed nearly identical form petitions which seek intervention individually and which authorize CCMN to represent their respective interests in the proceeding. On July 2, 1992, Mr. Pray augmented his petition to respond to questions of timeliness. Mr. Pray also authorizes CCMN to represent his interests. We discuss the status of the later-filed intervention pleadings on pages 10-11, infra.

[2]In our orders of June 30, and July 15, 1992, we requested the NRC Staff and the Licensee to defer answering later-filed intervention pleadings until further order of the Board. We also extended the time for answering.

that criticality analysis calculation errors with respect to the Millstone Unit No. 2 spent fuel pool had been discovered. The Licensee reported that:

> The safety consequence of this event is a potential uncontrolled criticality event in the spent fuel pool. Upon consideration of the following, a significant margin to a critical condition was always maintained and, therefore, the safety consequences of this event were minimal: [factors omitted]

Id. at 3.

Consequently, on April 26, 1992, the Licensee requested an amendment to its Millstone Unit 2 operating license incorporating proposed changes to spent-fuel pool technical specifications. Licensee reported that the calculational errors were due primarily to an incorrect treatment of Boraflex panels in the calculations and proposed several corrective modifications to the spent-fuel pool design, procedures, and terminology.

The NRC Staff, on behalf of the Commission, found that the proposed changes are acceptable and determined that the proposed amendment involves a "no significant hazards consideration" as provided by 10 C.F.R. § 50.92. Accordingly, on June 4, 1992, the Staff issued Amendment No. 158 to the Millstone Unit 2 facility operating license with supporting Safety Evaluation by the Office of Nuclear Reactor Regulation.

As noted at the outset, the notice of the opportunity for hearing on the proposed amendment had been published

earlier -- on April 28, 1992. Nevertheless, pursuant to the provisions of 10 C.F.R. § 50.91(a)(4), the amendment was issued before any hearing could be convened, even though adverse comments and requests for hearing had been received.

Questions Concerning Standing to Intervene

Although the Petitioners have not yet availed themselves of their right to state their final positions on standing to intervene, they have expressed concerns about a fuel pool accident in general (Pray and Marucci petitions) and a criticality accident in particular (Sullivan and Griffiths petitions). Their concern is that, because of the proximity of residences, schools and other physical features, they would be injured by such an accident at Millstone. These concerns are very similar to the traditional "injury-in-fact" ingredient of standing to intervene in NRC proceedings.

Similarly, the Licensee and the NRC Staff have yet to address the final positions of the earlier Petitioners, and they have not yet answered the later-filed petitions. Even so, their answers to the initial petitions have raised possibly novel questions which should be answered before any final ruling on standing to intervene.

As a part of their opposition to the initial Marrucci, Earthvision and Pray petitions, both the Staff and Licensee state in various terms that: (1) any injury-in-fact to

Petitioners must derive from the design change authorized by the amendment itself and not from a general concern about a criticality accident in the spent fuel pool; and (2) since the amendment reduces rather than expands the fuel pool's storage capacity, the amendment does not increase the risk to nearby residents from the operation of Millstone even if a related accident scenario existed prior to the amendment; therefore, (3) no injury-in-fact from the amendment can be inferred from proximity to Millstone.[3]

Taking their argument to its logical conclusion, the Licensee and Staff seem to argue that, if the amendment reduces risks from the pre-amendment condition, there can be no injury within the scope of the notice of opportunity for a hearing. Living or functioning in close proximity to the plant would be irrelevant to the issue of standing to intervene.

Assumptions

Solely for the purpose of discussing the standing-to-intervene issue, we assume (as Licensee states) that the amendment "simply imposes additional restrictions on the use of the Unit 2 fuel pool" and therefore would not increase risks from the pre-amendment condition. Licensee's Reply

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[3] E.g., Staff response to Earthvision at 7; Staff response to Marucci at 7; Licensee's response to Marucci at 9-10.

at 10. Indeed, for purposes of analysis we assume that the amendment actually decreases the risk of offsite releases from a spent fuel pool accident at Unit 2. We assume further that the pre-amendment accident under consideration is causally related to the event reported in LER 92-003-00.[4] With these assumptions the Board invites the Petitioners, the Licensee and, especially the NRC Staff, to address the following questions in the forthcoming round of intervention pleadings.

Question No. 1

Assuming as above stated, could an allegation that the technical specifications, as amended, do not bring the spent-fuel pool up to the licensing basis and do not satisfy NRC criticality requirements, establish injury-in-fact? In simpler terms, can nearby Petitioners suffer injury-in-fact from postulated offsite releases if the amendment increases safety, but not enough?

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[4]Any well founded, properly pleaded allegation that standing is based upon an increased risk caused by the amendment is not foreclosed by the Board's purely hypothetical assumptions. As the Licensee notes, the Staff's determination that the amendment is a "no significant hazards determination" is not binding on Petitioners. Licensee's reply to Pray petition at 13. Further, the Commission stated in the final procedures on "no significant hazards considerations," that such a determination is procedural only, without substantive safety significance. See n. 5, infra, 51 Fed. Reg. 7746.

Question No. 2

If question No. 1 is answered in the negative, what relief from relevant post-amendment risks are available to nearby residents?

Question No. 3

In discussing the final "no significant hazards consideration" procedures, the Commission provided examples of amendments that are considered likely, and examples that are considered unlikely to involve significant hazards considerations.[5] Among the examples in the "likely" category was:

> (vii) A change in plant operation designed to improve safety but which, due to other factors, in fact allows plant operation with safety factors significantly reduced from those believed to have been present when the license was issued.

Id. at 7751.

Does not the cited example, notwithstanding its category, indicate that the Commission does not intend to foreclose a hearing to persons whose interests may be affected by an amendment that does not in itself threaten injury, but where injury results directly from the amendment's failure to achieve adequate safety margins?

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[5]Final Procedures and Standards on No Significant Hazards Consideration, 51 Fed. Reg. 7744, 7750-51, March 6, 1986.

Amended and Supplemental Petitions

The intervention rule provides that any person who has filed a petition for leave to intervene pursuant to the rule may amend his or her petition without prior approval of the presiding officer (i.e., Licensing Board) at any time up to fifteen days prior to the holding of the first prehearing conference. 10 C.F.R. § 2.714(a)(1)(3).

In addition, Section 2.714(b)(1) provides that, not later than fifteen (15) days prior to the holding of the first prehearing conference, the Petitioner shall file a supplement to his or her petition to intervene which must include a list of the contentions which Petitioner seeks to have litigated in the hearing.

The NRC intervention rule tends to be forgiving in the sense that Petitioners have a chance to conform their petitions after seeing any objections to the initial petitions by the Licensee or the NRC Staff. In this case, Petitioners would be well served by examining carefully those objections. The questions we posed above should not be regarded as a road map to intervention. Standing with "injury-in-fact," as discussed in the cases cited by the Licensee and NRC Staff, is an absolute intervention requirement. Standing must be clearly and specifically established before intervention can be granted.

The Federal Register notice explained in detail the requirements for filing contentions in NRC proceedings. The Board recommends that the Petitioners study the contention requirements of the rule carefully since the rule provides that a Petitioner who fails to satisfy the requirements will not be admitted as a party. 10 C.F.R. § 2.714(b)(1), (2)[6].

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[6]In particular, Section 2.714(b) provides:

> (2) Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide the following information with respect to each contention:
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> (i) A brief explanation of the bases of the contention.
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> (ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.
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> (iii) Sufficient information (which may include information pursuant to paragraphs (b)(2)(i) and (ii) of this section) to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based

The Commission is not lenient in overlooking substantive shortcomings in intervention pleadings. It has stated that "the current section 2.714(b) provides rather clear and explicit notice as to the pleading requirements for contentions." Licensing Boards may not ignore those requirements when evaluating intervention petitions. Arizona Public Service Company, et al. (Palo Verde Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 n.1 (1991).

Later-Filed Petitions

The Federal Register notice set May 28, 1992 as the date by which petitions for leave to intervene may be filed in this proceeding and explained that nontimely filings will not be entertained absent a balancing of the factors specified in 10 C.F.R. § 2.714(a)(i)-(v).[7] The petitions of

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on the applicant's environmental report. The petitioner can amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's document.

[7] The five factors to be balanced 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.

Mr. Pray, Mr. Sullivan and Ms. Griffiths were filed after May 28.[8] Complicating this situation is the fact that all three of the later-filing Petitioners, arguably with standing to intervene, are members of CCMN and authorize that organization to represent them. Ms. Marucci filed a timely petition as an individual, but may lack standing to intervene as an individual. She also alluded to her role as the coordinator of CCMN. That organization later ratified Ms. Marucci's initial timely filing.

The Board will consider amendments to petitions addressing the five factors to be balanced for nontimely petitions. We shall also consider any arguments that the CCMN petitions as a group are timely. Licensee and the NRC Staff may, of course, answer these arguments.

Schedule for Further Intervention Pleadings

The sequence and timing of the filing of amended and supplemental petitions under the rule can be changed by

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(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.

[8]Mr. Pray filed a letter supplement dated July 2, 1992 to his petition, in which he argues that his petition was not untimely. The Licensee and NRC Staff have not had an opportunity to answer Mr. Pray's July 2 filing.

order of the Board to provide for the efficient and rational management of the proceeding. 10 C.F.R. §§ 2.711, 2.718(m). There is normally no need for a prehearing conference until it has been established by the filing of at least one facially acceptable contention by a Petitioner with standing to intervene that a hearing might be required.[9] Therefore, the Board suspends the provisions of the rule that permits filing up to fifteen days before the prehearing conference and sets another schedule below.

ORDER

Pleadings shall be filed in accordance with the following schedule:

Each Petitioner may file no later than August 14, 1992 an amended petition and a supplement to his or her petition which includes a list of contentions which Petitioner seeks to have litigated in a hearing.[10]

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[9]Also, if the petitioners wait until fifteen days before the first prehearing conference to file amended and supplemental petitions, the answers to those petitions would not be in the hands of the Board and parties until the very day of the prehearing conference at the earliest, and possibly several days later. In short, the Board and parties would not be prepared to attend to the very business for which the prehearing conference is convened if the schedule set out in the rule is followed.

[10]Parties to NRC proceedings are responsible for serving their papers directly upon other parties and members of the Board in compliance with the provisions of 10 C.F.R. § 2.701. So far the Petitioners have not been complying with the service requirements. The Clerk to the Licensing Board will provide to the Petitioners a current service list

Licensees may file answers to amended petitions and supplements to petitions within ten days after service of the amended petitions or supplements.

The NRC Staff shall file answers to amended petitions and supplements within fifteen days following their service.

THE ATOMIC SAFETY
AND LICENSING BOARD

Charles N. Kelber
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Ivan W. Smith, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland

July 29, 1992

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for this proceeding. Petitioners must carefully follow the provisions of 10 C.F.R. Part 2 (Rules of Practice) in future filings. Intuitive intervention in NRC proceedings has a high probability of failing.

A copy of the pertinent regulations, 10 C.F.R. Parts 0 to 50, is available from the U. S. Government Printing Office, Superintendent of Documents, Mail Stop: SSOP, Washington, DC 20402-9328 or may be examined at the local public document room as stated in the Federal Register notice of this proceeding.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB M&O RE PLEADING SCHEDULE 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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Dated at Rockville, Md. this
29 day of July 1992

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