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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NORTHEAST NUCLEAR ENERGY COMPANY'S (1) ANSWER TO THE LICENSING BOARD'S QUESTIONS AND (2) ANSWERS TO PETITIONS AND SUPPLEMENTAL PETITIONS TO INTERVENE

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Nuclear Energy Company

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I. INTRODUCTION

In accordance with the Licensing Board's Memorandum and Order of July 29, 1992,[1] and pursuant to 10 C.F.R. § 2.714(c), Northeast Nuclear Energy Company ("NNECO") herein files its answer to the questions posed by the Licensing Board in its Memorandum and Order, and answers additional petitions and supplements to petitions filed in this proceeding. On several independent bases discussed below, all petitions should be denied.

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[1] Memorandum and Order (Establishing Pleading Schedule), ASLBP No. 92-665-02-OLA, July 29, 1992 ("Memorandum and Order").

II. BACKGROUND

A. Chronology

On April 16, 1992, NNECO submitted to the NRC "Millstone Nuclear Power Station Unit 2 Proposed Revision to Technical Specifications, Spent Fuel Pool Reactivity" ("Amendment 158"). On April 28, 1992, the NRC Staff issued a preliminary determination that NNECO's license amendment request involved no significant hazards consideration, and, in accordance with 10 C.F.R. §§ 2.105 and 50.91, published a notice of opportunity for hearing.[2/] That Federal Register 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.

In response to the notice, nontimely requests for hearing and petitions to intervene were filed by Ms. Mary Ellen Marucci (postmarked May 29) and EARTHVISION, Inc. (by Ms. Patricia R. Nowicki, also postmarked May 29).[3/] Mr. Michael J. Pray subsequently filed a nontimely petition to intervene and request for hearing postmarked June 3. On June 4, 1992, the NRC Staff made a final "no

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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).

3/ Under 10 C.F.R. § 2.701(c), "[f]iling by mail or telegram shall be deemed to be complete as of the time of deposit in the mail . . . ." Thus, the postmark indicates the date of filing and the Marucci and EARTHVISION, Inc., petitions were untimely.

significant hazards consideration" finding and issued Amendment 158 in accordance with 10 C.F.R. § 50.91(a)(4).

On June 11, 1992, NNECO filed an answer to the Marucci and EARTHVISION, Inc., petitions to intervene, and on June 18, 1992, NNECO filed an answer to the Pray petition.[4] These answers opposed the respective petitions and hearing requests on grounds that the petitioners had failed to satisfy the requirements of 10 C.F.R. § 2.714 and the standards set forth in the NRC notice. Similarly, on June 16, 1992, June 17, 1992, and June 22, 1992, the NRC Staff responded to the petitions, arguing that Ms. Marucci, EARTHVISION, Inc., and Mr. Pray had not satisfied NRC requirements for intervention.[5]

Later-filed petitions to intervene and requests for hearings were filed by additional parties,[6] prompting the Licensing Board to issue Orders on June 30 and July 15, 1992, requesting the Staff and NNECO to defer answering, pending further order of the Licensing Board. The Licensing Board's July 29 Memorandum and Order set a

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[4] See "Licensee Northeast Nuclear Energy Company's Reply to Requests for Hearing and Petitions to Intervene by M.E. Marucci and Earthvision, Inc.", June 11, 1992, and "Licensee Northeast Nuclear Energy Company's Answer to Request for Hearing and Petition to Intervene by M.J. Pray", June 18, 1992.

[5] See "NRC Staff Response to EARTHVISION's Letter Request for Hearing", June 16, 1992; "NRC Staff Response to Mary Marucci's Request for Hearing", June 17, 1992; "NRC Staff Response to Michael J. Pray's Request for Hearing," June 22, 1992.

[6] These petitions are identified in section II.C, infra.

schedule for the filing of amended and supplemental petitions to intervene and answers to such petitions. In addition, the Licensing Board requested that the various petitioners, the NRC Staff, and NNECO address specific questions concerning standing to intervene in this proceeding. NNECO provides its response to all of the above in this answer.

B. Nature of Spent Fuel Pool License Amendment

Amendment 158 revised Technical Specifications governing use of the spent fuel pool at Millstone Unit No. 2. The Amendment modified administrative controls over the use of the spent fuel pool so as to impose additional restrictions upon use of the pool. Specifically, prior to Amendment 158, fuel storage racks in the spent fuel pool were administratively partitioned into two regions. The Amendment authorized NNECO to divide the same racks into three regions and, by allowing installation of blocking devices, reduced the number of fuel bundles that can be stored in one of the three regions. As a result, the overall fuel storage capability of the Unit 2 spent fuel pool was reduced from 1112 to 1072 fuel bundles. Amendment 158 is, therefore, restrictive in nature.

Amendment 158 was motivated by a recently discovered calculation error in the spent fuel pool criticality analysis.[2/]

2/ An array of fuel is "critical" when the number of neutrons produced by fission in the fuel equals the number of neutrons absorbed in the array or leaking out of the array. The ratio (continued...)

The actual K_{eff} in the spent fuel pool was still subcritical and less than the Technical Specification limit of 0.95 when the calculational error was discovered. However, a revised calculation of K_{eff}, assuming a spent fuel pool at full capacity and other conservatisms, determined a maximum K_{eff} to be 0.963 rather than the previously-calculated 0.922. This result was inconsistent with previous safety analyses, and was reported to the NRC in Licensee Event Report 92-003. Amendment 158 ensures that K_{eff} will be less than 0.95 in all cases, by requiring that a portion of the existing fuel racks be designated for spent fuel that has undergone a specified burnup, and that blocking devices be installed in a portion of the existing racks to reduce the amount of fuel to be stored in these racks. This increases the distance between fuel bundles, which results in a lower K_{eff}.

C. Background Discussion of Petitioners

1. Mary Ellen Marucci

On May 29, 1992, Ms. Mary Ellen Marucci, Coordinator of the Cooperative Citizen's Monitoring Network ("CCMN"), filed a

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[2/](...continued)
of the number of neutrons produced to the number of neutrons lost and absorbed is called the effective neutron multiplication factor, or "K_{eff}." When K_{eff}=1, the array is critical, i.e., the number of neutrons produced equals the number of neutrons lost. K_{eff} in the spent fuel pool is required by Millstone Unit 2 Technical Specifications §§ 3.9.18 and 5.6.1 to be less than 0.95 (i.e., subcritical, with 5% margin to critical).

nontimely petition to intervene on her own behalf. She has filed no other documents as an individual in this proceeding. In its June 11, 1992 answer opposing Ms. Marucci's petition, NNECO maintained that Ms. Marucci had not demonstrated standing to intervene in a proceeding restricted to Amendment 158. NNECO adheres to its prior response to this petition.

2. Cooperative Citizen's Monitoring Network

On June 23, 1992, CCMN filed an unsigned document entitled "Motion to amend petition to intervene and Motion for leave to file additional affidavit" ("Motion"). Although CCMN's June 23 Motion is unsigned, it lists certain individuals as serving on the CCMN Board of Directors. NNECO therefore proposes to treat the June 23 Motion as having been filed by CCMN, as an organization. The CCMN Motion identifies no particular petition to intervene which it purports to amend, but NNECO assumes that the Motion, and proposed amendment thereto, are directed to Ms. Marucci's initial petition to intervene as an individual, dated May 28, 1992, and filed May 29, 1992.

On August 12, 1992, CCMN asked for a ten-day extension beyond the August 14, 1992, date to file proposed contentions. This was granted by the Licensing Board on August 18, 1992. CCMN filed

its proposed contentions on August 24.[3] Below, NNECO addresses CCMN's standing, lateness, and proposed contentions.

3. Patricia R. Nowicki & EARTHVISION, Inc.

Ms. Nowicki filed a nontimely petition to intervene on behalf of EARTHVISION, Inc., postmarked May 29, 1992. As with Ms. Marucci, NNECO maintained in its June 11, 1992 reply that EARTHVISION, Inc., had not demonstrated that it had standing to intervene in a proceeding on Amendment 158. NNECO adheres to its prior answer to this petition.

In a letter dated July 29, 1992, Ms. Nowicki notified the Licensing Board that the name EARTHVISION could not be used as an organizational name; therefore, lacking an organizational name, Ms. Nowicki wished to continue the EARTHVISION, Inc., petition as a petition on her behalf as an individual. This request is addressed below.

4. Michael J. Pray

Mr. Pray filed a nontimely petition to intervene, postmarked May 29, 1992, identifying himself as a member of CCMN and authorizing CCMN to represent his interests. In its June 18, 1992

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[3] In addition, CCMN has submitted a letter dated August 13, 1992, entitled "Amendment to Intervention and Hearing Request." It is unclear what CCMN intended by this filing. It was not served on licensee's counsel. For purposes of this Answer, we assume that it has been superseded by CCMN's August 24, 1992 filing.

answer, NNECO maintained that Mr. Pray had not demonstrated standing to intervene in this proceeding and, in any event, had failed to justify a nontimely intervention petition in accordance with the factors of 10 C.F.R. § 2.714(a)(1).

On July 2, 1992, Mr. Pray filed a letter with the Board clarifying his interests and giving a reason why his petition was nontimely. These arguments are addressed below.

5. Rosemary Griffiths

Ms. Griffiths filed a nontimely petition to intervene on June 29, 1992. This petition indicates that she is associated with CCMN (or EARTHVISION, Inc.) and requests that her interests be represented by CCMN (or EARTHVISION). She filed this same petition on August 13, 1992, with a cover letter clarifying that she wanted CCMN to represent her interests. However, the petition still lacks specificity regarding her membership in CCMN.

6. Joseph M. Sullivan

Mr. Sullivan filed a nontimely petition to intervene on July 6, 1992. This petition is in the same form as Ms. Griffiths'. Mr. Sullivan indicates that he is a member of CCMN (or EARTHVISION, Inc.) and authorizes CCMN (or EARTHVISION) to represent him. He has submitted no further information clarifying his affiliations or desires for representation.

7. Frank X. LoSacco

Mr. LoSacco filed a nontimely petition to intervene, dated August 13, 1992. The petition as filed is a "sample affidavit" to be "adjust[ed]" to specific "needs." However, the petition as filed was not "adjusted" and is ambiguous as to Mr. LoSacco's affiliation with CCMN or EARTHVISION, and is equally ambiguous with respect to which organization he authorizes to represent him.

8. Don't Waste Connecticut

Don't Waste Connecticut ("DWC") filed a nontimely petition to intervene (dated June 26, 1992) on August 13, 1992. The petitioner, apparently an organization, authorizes CCMN to represent its interests, but notes that it is "not affiliated with CCMN." The petition also does not specify any members whose interests would be affected by Amendment 158 or whose interests would be represented by DWC/CCMN.

III. STANDING

A. The Requirements for Standing

1. Regulations and Case Law

Under NRC regulations implementing the Atomic Energy Act of 1954, as amended, "[a]ny 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." 10 C.F.R. § 2.714(a)(1). According to section 2.714(a)(2), such petitions:

> 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 matter of the proceeding as to which petitioner wishes to intervene.

Under section 2.714(d)(1), a petition for leave to intervene must also 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.

The NRC applies judicial concepts of standing in determining whether a petitioner has sufficient interest in a proceeding to be entitled to intervene as a matter of right. Sacramento Mun. Util. Dist. (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992). "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 Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-83-25, 18 NRC 327, 332 (1983). According to the licensing board in Cleveland

Elec. Illuminating Co. (Perry Nuclear Power Plant, Unit 1), LBP-92-4, 35 NRC 114, 121 (March 18, 1992):

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

Importantly, any asserted injury that would form the basis for standing must be tied to the agency action at issue. The injury must be one that "can be traced fairly to the challenged action . . . ." Public Serv. Co. of New Hampshire (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 267 (1991). "[T]here must be a causal nexus between the asserted injury and the challenged action." Perry, LBP-92-4, 35 NRC at 121. Further, the injury must be "likely to be redressed by a favorable decision in the proceeding." Seabrook, CLI-91-14, 34 NRC at 267.

2. Organizational Standing

The same showing of injury is required regardless of whether the petitioner is an individual or an organization. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 529 (1991). An organization that seeks to intervene in its own right must establish injury in fact (that is, real or threatened harm, not merely an academic interest) to its organizational interests within the zone of interests protected by the Atomic Energy Act. Id. at 529-30. This standard

is not met "if the asserted harm is only a generalized grievance shared by all or a large class of citizens that does not result in palpable injury." Id. at 529.[9]

To establish standing as the representative of members who themselves have an interest in the proceeding, the organization must identify at least one member, by name and address, having the interest and must provide concrete evidence (such as an affidavit) that the member wishes to be represented by the organization. Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118 (1987); Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2) LBP-78-37, 8 NRC 575, 583 (1978).

3. Proximity of Residence as a Basis for Standing

The proceeding on Amendment 158 is a license amendment proceeding. While a petitioner's residence within fifty miles of a power reactor may support a finding of standing in an operating license proceeding, Philadelphia Elec. Co. (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

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[9] Similarly, mere academic interest in a matter is not sufficient to establish standing. Sierra Club v. Morton, 405 U.S. 727, 739-40 (1972); Edlow International Co. (Agent for the Government of India on Application to Export Special Nuclear Material), CLI-76-6, 3 NRC 563, 572 (1976).

the petitioner to rest on the mere presumption that residence within fifty miles of the reactor creates standing.

As the Commission noted in St. Lucie, 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 Co. (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).

In Virginia Elec. & Power Co. (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 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 Co. (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. Where an amendment at issue could cause no harm offsite, it follows that standing must be denied.[10/]

10/ 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. . . .
(continued...)

4. Standing Generally in the Present Case

The caselaw discussed above demonstrates that there are several prerequisites to a finding of standing in an NRC operating license amendment case. Specifically, an "injury in fact" cannot exist unless a would-be intervenor affirmatively demonstrates:

- an injury that is "particular" and "concrete," as opposed to conjectural, hypothetical and abstract;[11] and
- the license amendment at issue must be one with "a clear potential for offsite consequences;"[12] and
- any alleged offsite injury must be caused (i.e., "traced fairly") to the license amendment at issue;[13] and
- the injury must be one that could be "redressed by a favorable decision in the proceeding."[14]

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[10] (...continued)
[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.

[11] Perry, LBP-92-4, 35 NRC at 121.

[12] St. Lucie, CLI-89-21, 30 NRC at 329.

[13] Seabrook, CLI-91-14, 34 NRC at 267.

[14] Id.

None of the petitioners has made, or could make, these showings in the present proceeding.

As discussed in NNECO's June 10 and June 18 replies to the earlier petitions in this case, Amendment 158 is restrictive in nature -- it reduces the storage capacity of the Millstone Unit 2 fuel pool. A reduction in the capacity of the spent fuel pool and a reduction of the maximum K_{eff} to the previous licensing basis level, both conservative changes in terms of nuclear safety, are changes that perforce can occasion no harm offsite. Compare North Anna, ALAB-790, 20 NRC at 1454 (denying standing in a proceeding on an amendment to expand storage capacity); Pilgrim, LBP-85-24, 22 NRC 97 (denying standing in a proceeding on an amendment allowing an increase in maximum K_{eff}). General interests in safety at Millstone Station, or in the safety of spent fuel pool storage at Unit 2, are outside the scope of the present proceeding and cannot confer standing.

Although some design basis fuel pool scenarios could result in radioactive releases offsite, there is no causal nexus between such releases and the Amendment at issue. The petitioners have not shown how any such offsite releases would be caused or exacerbated by Amendment 158.[15/] Indeed, in his Affidavit attached hereto,

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15/ NNECO included in its June 11 answer to the petitions of Ms. Marucci and EARTHVISION, Inc., an Affidavit of Mr. Raymond Crandall, which addressed the most limiting design basis spent fuel pool accidents, as described in the (continued...)

Mr. Raymond Crandall addresses consequences at the site boundary from the postulated design basis spent fuel pool accidents, and concludes that the changes to the pool resulting from Amendment 158 will not increase the consequences from such accidents. Therefore, petitioners can suffer no injury in fact due to Amendment 158, and standing must be denied.

Even assuming petitioners were granted relief in the proceeding by denial of Amendment 158, the asserted injury would not be redressed by this agency action. In fact, this result would return the spent fuel pool administrative controls to the earlier version, which -- although safe given current fuel storage conditions -- is less conservative than those authorized by Amendment 158. Thus, the relief requested (and available in this proceeding) would not redress the asserted injuries. Any asserted injury to petitioners is therefore outside the scope of the proceeding and does not provide a basis for standing. Seabrook, CLI-91-14, 34 NRC at 267.

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[19](...continued)
Millstone Unit 2 Final Safety Analysis Report. (The postulated fuel handling and cask drop accidents are the design basis fuel pool accidents. (See Unit 2 FSAR section 14.7.4.3.1 and Table 14.7.4-1.)) Mr. Crandall concluded that offsite consequences from these design basis accident scenarios at a distance of 40 miles from the plant would be minimal. (The distance of 40 miles was selected based on Ms. Marucci's stated residence.)

B. Answers to Board's Questions Concerning Standing

In its July 29, 1992, Memorandum and Order, the Licensing Board invited the petitioners, Licensee and the NRC Staff to address three questions. NNECO's responses are provided below.[16]

1. Question 1

Assuming as above stated,[17] 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?

In general, to have standing, a petitioner must show that the challenged action will cause the petitioner an injury in fact, and that the injury is likely to be redressed by a decision in the proceeding favorable to the petitioner. For the hypothetical of

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[16] NNECO notes here that none of the petitioners has addressed these questions. The petitioners' failure to respond to a specific Memorandum and Order should be considered by the Licensing Board when addressing whether the petitions meet the requirements for late intervention, as discussed in section IV below. In its statement on the need to conduct all phases of the hearing process in a balanced and efficient manner, the Commission has previously stressed the need for all parties to fulfill obligations imposed by a Commission proceeding. See Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981).

[17] Assumptions are: (1) that the amendment decreases the risk of offsite releases from a spent fuel pool accident at Unit 2, and (2) the pre-amendment accident under consideration is causally related to the condition reported in LER 92-003-00.

Question 1, the challenged action, i.e., issuance of a license amendment imposing restrictions to increase safety, does not cause the alleged injury in fact, and the injury is not likely to be redressed by a decision in the proceeding.

Standing first fails based on causality. While it is true, under the hypothesis of Question 1, that the potential concern is not rectified by the license amendment, neither is it caused by the license amendment. For standing, the licensing action (i.e., issuance of the license amendment) must cause the injury in fact. Three Mile Island, CLI-83-25, 18 NRC at 332. In our case, a prior calculational error, not the Amendment at issue, caused a reduced margin of safety. The Amendment itself will not cause an injury, and in fact is intended to reduce the risk of potential offsite exposures. Likewise, the hypothetical petitioner of Question 1 would not be able to demonstrate the requisite "clear potential for offsite consequences" resulting from the challenged action.

Linked to the causality requirement for standing is the companion mandate that the injury is "likely to be redressed by a favorable decision in the proceeding." Seabrook, CLI-91-14, 34 NRC at 267. If the licensing action challenged in the proceeding is not the cause of the potential injury, a favorable decision cannot redress the injury. Thus, in a license amendment proceeding limited

in scope to whether the amendment should be issued,[18] a decision in favor of the petitioners (i.e., to not issue the amendment) would not redress the potential injury.

The issue of whether the license amendment will return the facility to its design basis level of safety is not a matter before the Licensing Board. Likewise, the intervenor cannot expand the scope of the proceeding to encompass the adequacy of the design/licensing basis. Standing would only exist for an amendment if there was some potential ancillary injury caused by the amendment, rather than by the pre-existing condition, that would have some arguable offsite consequences (see the discussion of Question 3 below). In the case of Amendment 158, there has been no such showing of injury.

The Commission's authority, under Atomic Energy Act section 189(a), to define (and limit) the scope of a proceeding was

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[18] Licensing Board jurisdiction is limited to issues "within the scope of matters outlined in the Commission's notice of hearing on the licensing action," Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), ALAB-739, 18 NRC 335, 339 (1983).

Regarding NNECO's Amendment 158, the "action" before the Licensing Board is whether the license amendment, as proposed, should be issued. According to the notice of opportunity for hearing:

> the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license . . . .

57 Fed. Reg. 17934 (emphasis added).

addressed in Bellotti v. Nuclear Regulatory Comm'n., 725 F.2d 1380 (D.C. Cir. 1983). The petitioner in Bellotti appealed the Commission's denial of intervention in a proceeding to determine whether a Commission order to a licensee should be sustained. The order directed the licensee to develop a plan to improve management functions. Id. at 1381-82. The petitioner questioned the adequacy of the corrective action ordered by the Commission. However, the Commission had narrowly defined the scope of the proceeding to encompass only the question of whether the order should be sustained.

Noting that the Commission's decision to limit the scope of the proceeding was not arbitrary, the Bellotti Court found the supporting basis of directing agency resources toward inspection rather than adjudication to be rational and that the Commission's policy served its purpose well. In addition, that Court noted that there were other routes open to petitioner to raise his issues, and allowing the petitioner to expand the scope of the hearing "would result in a hearing virtually as lengthy and wide-ranging as if intervenors were allowed to specify the relevant issues themselves." Id. at 1382. In language instructive to the present case, the Bellotti Court noted that:

> The Commission's power to limit the scope of a proceeding will lead to denial of intervention only when the Commission amends a license to require additional or better safety measures. Then, one who . . . wishes to litigate the need for still more safety measures, perhaps including

> the closing of the facility, will be remitted to section 2.206's petition procedures.

Id. at 1383.

In summary, the hypothetical proposed by Question 1 might give rise to a potential injury in fact in some context, but that injury does not confer standing in this license amendment proceeding. First, a causal nexus is lacking; the amendment as proposed is not the cause of the injury. Second, a hypothetical injury to a petitioner caused by pre-existing conditions, such as inadequate spent fuel pool design or administrative controls, could not be redressed by a decision of the Licensing Board with respect to whether an amendment intended to improve safety by addressing the pre-existing condition should be issued.

2. Question 2

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

As suggested by the foregoing discussion, there is a remedy available to all members of the public who wish to focus the attention of the NRC Staff on certain licensed activities. That remedy is provided by the Commission's Rules of Practice, 10 C.F.R. § 2.206. Any petitioner may, therefore, seek relief from post-amendment risks in this case under 10 C.F.R. § 2.206. As pointed out by the Bellotti Court,

> [p]etitioner . . . is in no sense left without recourse by the NRC's denial of intervention . . . . Commission regulations provide for public petitions to modify a license, which may lead to license modification proceedings if the Commission finds that appropriate. 10 C.F.R. § 2.206 (1983).

Id. at 1382.

A section 2.206 proceeding is in fact the appropriate forum for addressing generalized concerns related to plant design and operation. A petitioner in a section 2.206 proceeding may raise any issue of technical adequacy or compliance, including that the plant does not meet its design basis and/or that the design basis is inadequate. As noted in the answer to Question 1, while these issues are outside the scope of this amendment hearing, they are certainly subject to consideration in a section 2.206 proceeding.[19/]

3. Question 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.' 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.**

19/ Nonetheless, even in a section 2.206 proceeding, a petitioner could not in this forum challenge the adequacy of NRC regulations. See 10 C.F.R. § 2.758.

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?

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

The "no significant hazard consideration" standard ("Standard") is the test by which the Commission resolves procedural questions of when a hearing is held; i.e., whether any hearing that is ordered must be held prior to or following issuance of a license amendment. The Standard does not relate to whether a hearing should be held.[20/] Regardless of whether an amendment involves significant, or no significant hazards considerations, an opportunity for hearing is provided to the public. Because the "no significant hazards consideration" standard addresses the timing of

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[20/] The Commission addressed this issue in its Statement of Considerations for the "Final Procedures and Standards on No Significant Hazards Considerations," 51 Fed. Reg. 7744. Specifically:

> the "no significant hazards consideration" standard is a procedural standard which governs whether an opportunity for a prior hearing must be provided before action is taken by the Commission . . . .

51 Fed. Reg. at 7746. It is also worth noting "that there is no intrinsic safety significance to the 'no significant hazards consideration' standard." Id.

a hearing, and not whether a hearing should be held, we cannot infer from example (vii) any Commission intent regarding standing of specific intervenors in a hearing on license amendments that might fall into this category.

It would appear that the Commission intended example (vii) to apply to situations where a license amendment improved safety in one area, while reducing safety in an unintended collateral, but significant, manner. For example, a license amendment authorizing a new emergency cooling pump may improve safety by providing additional system redundancy, but may reduce the safety of the electrical distribution system by exceeding the load capability of emergency power sources. The Commission's intent is apparent in the commentary at 51 Fed. Reg. 7748 explaining example (vii). There, the Commission explains that a license amendment designed to improve safety could result in a net reduction in safety margin as a result of other problems. This could occur, to give another example, where a licensee proposes an interim or final resolution of some significant safety issue that was not raised or resolved before issuance of the operating license:

> In this instance, the presence of the new safety issue in the review of the proposed amendment, at least arguably, could prevent a finding of no significant hazards consideration, even though the issue ultimately would be satisfactorily resolved by the issuance of the amendment. Accordingly, the Commission added a new example (vii) . . . .

51 Fed. Reg. at 7748. Thus, in both examples the proposed amendment would involve a s nificant hazards consideration and any hearing to be conducted on the amendment would be conducted before the amendment became effective.

NNECO's Amendment 158 does not introduce collateral, negative impacts on safety that would offset the positive impacts. It does not reduce a margin of safety in any area. Likewise, it does not involve any new, previously unaddressed, safety issues.[21] Therefore, the NRC Staff correctly concluded that Amendment 158 involves no significant hazards consideration and correctly issued the Amendment before the completion of the instant proceeding. Example (vii) of the Commission's examples of amendments that could involve significant hazards consideration bears only on the timing of a hearing, and does not suggest that standing would exist in the present case.

C. Discussion of Petitioners' Standing

1. Ms. Marucci

As discussed in NNECO's June 11, 1992, reply to the Marucci petition to intervene, Ms. Marucci's original letter to the NRC fails to establish sufficient interest in this license amendment proceeding to confer status to intervene as a party. If CCMN's

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[21] Even assuming such an issue, such as some new factor related to spent fuel pool rack design, example (vii) would suggest only that significant hazards considerations exist -- not that standing exists.

June 23, 1992, Motion (discussed below) is deemed to constitute another attempt by Ms. Marucci to establish standing for individual intervention in this proceeding, this Motion must also fail. This additional submittal provides no new information sufficient to confer standing on Ms. Marucci, and does not otherwise remedy the defects in the original petition.

For the reasons addressed above, Ms. Marucci has not alleged any offsite injury caused by Amendment 158; a favorable decision in this proceeding would not redress Ms. Marucci's alleged injuries; and, therefore, Ms. Marucci's petition should be denied.

2. CCMN

If the Licensing Board treats CCMN's June 23, 1992, Motion as a petition for leave to intervene on behalf of CCMN, the petition must be rejected. CCMN has not shown that either it, or its members, will be injured as a result of Amendment 158.

First, CCMN's Motion fails to establish organizational standing, since petitioners make no showing that the organization itself will be injured by NNECO's license amendment. See Vermont Yankee, LBP-87-7, 25 NRC 116. Contrary to the requirements of section 2.714(d)(1), neither CCMN's petition nor its later filing with proposed contentions address the nature of CCMN's right to intervene, or set forth with particularity the organization's interest in the proceeding. The vague reference to alleged public concern of "irreparable damage" from the operation of the spent fuel

pool is the type of "generalized grievance" which the Commission has held to be inadequate to establish standing. See, e.g., Turkey Point, ALAB-752, 33 NRC at 529. Likewise, CCMN has failed to demonstrate that its interests (if any) may be affected by the results of the proceeding. See id.

Second, to demonstrate standing as an organization representing the interests of its members, CCMN must identify the member(s) having an interest in the proceeding. See Vermont Yankee, LBP-87-7, 25 NRC at 118. CCMN has failed to identify any individuals having the requisite interest. Mr. Pray identified himself as a member of CCMN in his June 3, 1992, letter, and requested that CCMN represent his interests. It is not clear whether Messrs. Sullivan and LoSacco and Ms. Griffiths are members of CCMN or EARTHVISION, or whether they wish CCMN or EARTHVISION to represent their interests. However, for the reasons articulated in section III.A.4 above, and as discussed below, none of these individuals has demonstrated standing.

3. Ms. Nowicki and EARTHVISION, Inc.

For the reasons set forth in NNECO's June 11 answer to EARTHVISION, Inc.'s petition to intervene, i.e., that EARTHVISION, Inc., showed no organizational interest in this proceeding, and that Ms. Nowicki did not have sufficient interest in the proceeding to confer standing to intervene as an individual, EARTHVISION's petition to intervene should be denied.

In a July 29, 1992, letter, Ms. Nowicki stated her intent to replace EARTHVISION, Inc., as petitioner. She also alleged that additional harm would result from "any accident occurring as a result of the design changes in the Unit 2 spent fuel pool at Millstone." Petitioner does not explain what that accident might be, but alleges a resulting harm comprising an increase in her electrical rates and a decrease in her dividends, increases in federal and state taxes, and increases in local health insurance rates.

The licensing board in Perry, LBP-92-4, 35 NRC at 121-22, rejected as a basis for standing assertions of harm of this type. Such assertions are conjectural and hypothetical, as opposed to particular and concrete. Also, economic interests, such as the cost of electricity to ratepayers, are not within the "zone of interest" protected by the Atomic Energy Act. Portland General Elec. Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614 (1976). General economic "issues are best directed to the state regulatory bodies in charge of rate setting and similar matters." Public Serv. Co. of New Hampshire (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975, 978 (1984).

Nor has Ms. Nowicki shown a nexus between the alleged harm and Amendment 158. Further, for the reasons stated above for CCMN, a favorable decision in this proceeding would not redress Ms. Nowicki's (or EARTHVISION's) alleged injuries. Accordingly, Ms. Nowicki's additional allegations of potential harm do not alter the

position in NNECO's June 11, 1992, answer, namely, that the Nowicki/EARTHVISION, Inc., petition to intervene should be denied for lack of standing of Ms. Nowicki.[22/]

4. Mr. Pray

As discussed in NNECO's June 18, 1992, answer to Mr. Pray's petition, Mr. Pray lacks sufficient interest to confer standing to intervene as a matter of right. Mr. Pray's July 2, 1992, letter provides no additional interest in the proceeding that could be affected by Amendment 158. Further, for the reasons stated above for CCMN, a favorable decision in this proceeding would not redress Mr. Pray's alleged injuries. Therefore, Mr. Pray's petition should be denied.

5. Ms. Griffiths, Mr. Sullivan and Mr. LoSacco

Mr. Sullivan, Ms. Griffiths and Mr. LoSacco filed similar form-letter petitions with the Board, each alleging the same general injury, i.e., radioactive contamination of food, water, land and other property, injury to career, feelings of insecurity, and effects on children. Each lives within a few miles of Millstone Unit 2, except for Mr. LoSacco who lives about thirty miles away.

22/ According to Ms. Nowicki, EARTHVISION, Inc., may no longer exist as an entity; therefore, the organization should be excluded from consideration as a petitioner. A non-existent entity obviously cannot participate in a proceeding.

However, none of these petitioners have demonstrated an interest in the proceeding sufficient to confer standing or to be granted intervenor status.[23]

Petitioners do not set forth with particularity their interests in the proceeding, how those interests may be affected by the results of the proceeding, and the reasons why they should be permitted to intervene. Therefore, the Commission cannot affirmatively find such interests to exist. Moreover, such interests may not, for the reasons discussed above, be inferred merely from the distance to Petitioners' residences from Millstone Unit 2, which range from 30 to 1.5 miles. As shown by the Commission's precedents, mere proximity to Millstone Unit 2 is insufficient interest to confer standing in this amendment proceeding.

Petitioners have alleged in their letters that a spent fuel pool accident resulting in the release of radioactive materials into the air would contaminate their families' sources of drinking water, "would make it difficult to find uncontaminated food, air, or soil," and would affect the value of their property. However, petitioners have not shown a nexus between these alleged injuries and Amendment 158. Without such a nexus between the asserted injury and the agency action at issue, there can be no standing.

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[23] Likewise, these interests do not provide a basis for intervention by CCMN on a representational basis.

Further, for the reasons stated above for CCMN, a favorable decision in this proceeding would not redress the petitioners' alleged injuries. Therefore, these petitions should be denied.

6. DWC

As noted above, an organization may establish standing to participate either as an organization or as a representative of one or more members. DWC's petition for leave to intervene must be rejected because it has not shown that either it, or any of its members, has standing in this proceeding.

Contrary to the requirements of section 2.714(d)(1), DWC's petition does not even address the nature of DWC's right to intervene, or set forth with particularity the organization's interest in the proceeding, or show how that interest (if any) may be affected by the results of the proceeding. See Turkey Point, ALAB-952, 33 NRC at 529. DWC's petition likewise fails to establish organizational standing, since petitioner makes no showing that the organization itself will be injured by Amendment 158. See Vermont Yankee, LBP-87-7, 25 NRC 116. DWC's broad reference to alleged harm to food, water, property, places of employment, and schools is the type of "generalized grievance" which the Commission has held to be inadequate to establish organizational standing. Washington Pub. Power Supply Sys. (WPPSS Nuclear Project No. 2), LBP-79-7, 9 NRC 330, 336 (1979) (even though Petitioners "may consume produce, meat products, or fish which originate within 50 miles of the site . . .

to allow intervention on this vague basis would make a farce of § 2.714 and the rationale in decisions pertaining to petitions to intervene."). See also Turkey Point, ALAB-952, 33 NRC at 528-30.

To demonstrate standing as an organization, if DWC does not have an organizational interest in the proceeding, it must identify a member having an interest in the proceeding. See Vermont Yankee, LBP-87-7, 25 NRC at 118. DWC has failed to identify any individuals having such an interest.

In its petition filed on August 13, 1992, DWC states that it is not affiliated with CCMN, but that it authorizes CCMN to represent its interests in this matter. Such an assertion provides no basis for standing to either CCMN or DWC. While CCMN may represent its members, "a petitioner cannot assert interest or claim relief on the legal rights of third parties . . . ." The Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 387 (1978). Since DWC is not affiliated with CCMN, DWC cannot be represented by CCMN in this proceeding. Even if it could, DWC has failed to show its own standing, and thus cannot be represented by CCMN. Therefore, DWC's petition should be denied, both in its own right and as support for CCMN's petition.

IV. LATENESS

A. Requirements Regarding Nontimely Petitions

NRC regulations are clear that a nontimely request for hearing/petition to intervene 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 Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350, 353-54 (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 Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 397 (1983) (citing Detroit Edison Co. (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 Co. (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 466, 468 (1985).

The published Federal Register notice in this proceeding also expressly stated that nontimely petitions for leave to intervene "will not be entertained" absent a determination by the Licensing Board that such a request should be granted based upon a balancing of both the factors in sections 2.714(d)(1) and 2.714(a)(1)(i)-(v). 57 Fed. Reg. at 17,935, col. 2-3. Indeed, the Licensing Board, in its July 29, 1992, Memorandum and Order, urged petitioners several times not to ignore NRC procedural requirements for intervention, and pointed the petitioners directly to the requirements for late petitions (Memorandum and Order, at 10-11). This certainly was fair warning of the obligations the NRC places upon those who seek access to its adjudicatory process. The fact that petitioners still failed completely to address these standards leads to the inescapable conclusion that, notwithstanding the issue of standing, all of the late-filed petitions should be denied.

B. Discussion of Petitioners' Lateness

Even if the Licensing Board chooses to overlook the procedural defect in the petitions regarding lateness, a reasonable balancing of the factors of 10 C.F.R. § 2.714(a)(1) weighs against admission of the petitioners.

1. CCMN

CCMN did not timely file a petition to intervene. The CCMN Motion of June 23, 1992, provides only a conclusory explanation for CCMN's failure to file a timely intervention petition ("[t]he board of CCMN was unable to act in sufficient time for the May 28, 1992 Federal Register deadline"), with no showing of good cause for the delay. As the petitioners are evidently aware, requests to intervene and for a hearing in this proceeding were due by May 28, 1992. In response to that publicly-announced deadline, Ms. Marucci submitted a nontimely petition which, she emphasized, was filed on her own behalf and not on behalf of CCMN. (Nor could it have been filed for CCMN, because CCMN appears not to have authorized any filing in this proceeding until June 23, 1992.)

CCMN, as a late-filing petitioner, is obligated by section 2.714(a) to address the required factors and to establish that the nontimely petition should be granted. However, CCMN's Motion does not even refer to the regulations in section 2.714(a)(1), nor does it attempt to address those requirements. Thus, CCMN has failed to establish that its nontimely petition to intervene should be granted, and therefore, the petition must be denied on this basis alone. See Perkins, ALAB-615, 12 NRC 350.

A balancing of the five factors in section 2.714(a)(1) clearly supports rejection of CCMN's nontimely petition. With regard to the first and most important factor, the "good cause" factor in section 2.714(a)(1)(i), the Motion states that the CCMN

board "was unable to act in sufficient time for the May 28, 1992 Federal Register deadline"; and, further, that "because of the difficulty our coordinator had in getting the information from the NRC, Connecticut state agencies and Northeast Utilities, there was insufficient time to get CCMN board approval for intervention as an organization . . . ."

These assertions by CCMN do not demonstrate good cause for several reasons. First, it is inconceivable that there was insufficient information in the Federal Register notice, referenced above, on which to timely file. (The due date speaks for itself.) Obviously, Ms. Marucci possessed sufficient information to file a petition to intervene one day late on her own behalf.[24/] It is unclear why the organization in which she serves as coordinator was purportedly unable to obtain the same information.[25/] Second, there is no right to discovery, and no obligation on NNECO's part to provide discovery, prior to an intervention petition. Any insinuation that CCMN was hindered by NNECO in its efforts to file

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24/ The reason given in Ms. Marucci's petition, postmarked May 29, 1992, was that she needed time to approach her organization on "what part they wish to play," not that CCMN lacked sufficient information to file a petition.

25/ Similarly, in CCMN's unsigned August 13, 1992, "Amendment to Intervention and Hearing Request," CCMN offers no explanation for the organization's failure to file a petition to intervene for almost a month after the deadline published in the Federal Register -- other than an alleged inability to obtain a copy of the notice until May 26. However, if Ms. Marucci had the Federal Register notice, it is unclear why CCMN did not have the notice.

an intervention petition by May 28 is totally unfounded. NNECO had no idea that Ms. Marucci intended to file a petition to intervene. And once that petition was served upon NNECO, the Company made every effort and informally provided Ms. Marucci and her organization with information that she requested. In sum, CCMN's Motion and the Amendment to the hearing request advance no plausible showing of good cause for CCMN's failure to file a timely petition to intervene. This factor must weigh heavily against it. See Shoreham, ALAB-743, 18 NRC at 397.

CCMN next fails to address the availability of other means whereby its interests may be protected, as required by section 2.714(a)(1)(ii). This is an important factor since NNECO believes, as discussed above, that the proper forum to address CCMN's allegations regarding the Unit 2 spent fuel pool is via a petition filed under 10 C.F.R. § 2.206. Regarding compliance with section 2.714(a)(1)(iii), CCMN's Motion provides no basis for this Licensing Board to conclude that the organization's participation will assist in developing a sound record. The lack of a response to the Licensing Board's questions, as discussed above, seems to indicate the contrary. This factor must, therefore, also weigh against allowing late intervention by CCMN.[26]

The fifth factor in section 2.714(a)(1) also argues against the petitioner. Based upon the pleadings it has filed, it is clear

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[26] See Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982).

that if CCMN is admitted as a party, CCMN's participation would be specifically designed to broaden the issues in contention and give rise to an unnecessary proceeding. In commenting on a similar situation, the Appeal Board in Cincinnati Gas & Elec. Co. (William H. Zimmer Nuclear Power Station), ALAB-305, 3 NRC 8 (1976), noted that "'a licensing board should take utmost care to satisfy itself fully that there is at least one contention advanced in the petition which, on its face, raises an issue clearly open to adjudication in the proceeding,'" and that "a board should take equal care in these cases to assure itself that potential intervenors do have a real stake in the proceeding." 3 NRC at 12 (citing Gulf States Utils. Co. (River Bend Station, Units 1 and 2), ALAB-183, 7 AEC 222, 226 (1974)). As discussed elsewhere, NNECO believes that CCMN has failed to raise issues truly related to Amendment 158, and instead seeks to litigate broadly the overall issue of the design and licensing basis of the spent fuel pool (as well as other tangential issues, such as those related to steam generators). On balance, therefore, the factors set forth in 10 C.F.R. § 2.714(a)(1) weigh heavily against accepting CCMN's late-filed petition to intervene.[27]

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[27] The fourth factor, the extent to which CCMN's interest will be represented by existing parties, cannot be determined at this time because the Licensing Board has not yet ruled upon other petitions for leave to intervene. However, even assuming no other parties are admitted to this proceeding, this one factor would not outweigh the other four.

In addressing the lateness of CCMN's request for hearing, it is important to note that CCMN, as an organization, cannot adopt the nontimely, but earlier, filing of Ms. Marucci by substituting petitioners. The June 23 CCMN Motion appears to be an attempt to substitute CCMN for Ms. Marucci and obtain for the organization intervening party status in this proceeding. The Motion suggests that CCMN's petition be allowed to replace the previous petition to intervene filed by Ms. Marucci, who is listed as the coordinator of CCMN:

> Now that the board has given its approval and designates Ms. Marucci to represent CCMN in this matter before the NRC, Ms. Marucci will cease representing herself as an individual and will now represent the organization and any members and unaffiliated persons or organizations who designate CCMN to represent them in this matter.

Although styled as a motion to amend a petition to intervene, the CCMN Motion is in fact a petition to intervene by a new entity and must be reviewed against the standards set forth in 10 C.F.R. § 2.714 governing late-filed petitions to intervene.

Attempts by petitioners to achieve intervenor status by bootstrapping themselves into prior intervention petitions have previously been rejected by the NRC:

> Section 2.714(a) requires all belated petitioners to make the "good cause" showing for their tardiness--no matter whether intervention is being sought on a substitution basis or, instead, for some other reason.

Gulf States Utils. Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 796 (1977). In River Bend, the Union of Concerned

Scientists ("UCS") sought to substitute itself for a prior participant which had withdrawn from the proceeding, and to pursue the same issues advanced by that prior participant. UCS asserted an interest in the proceeding based upon the residency of certain of its members in proximity to the proposed River Bend Station. Quoting Easton Utils. Comm'n. v. Atomic Energy Comm'n., 424 F.2d 847, 852 (D.C. Cir. 1970), the Appeal Board found:

> We do not find in statute or case law any ground for accepting the premise that proceedings before administrative agencies are to be constituted as endurance contests modeled after relay races in which the baton of proceeding is passed on successively from one legally exhausted contestant to a newly arriving legal stranger.

River Bend, 6 NRC at 797. See also South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881 (1981), aff'd, Fairfield United Action v. Nuclear Regulatory Comm'n., 679 F.2d 261 (D.C. Cir. 1982). Therefore, CCMN should be considered by the Licensing Board to be a separate entity, distinct from Ms. Marucci, and responsible for meeting the Commission's requirements on its own behalf. As such, the CCMN petition (Motion) must fail.[28/]

[28/] With respect to CCMN, it is also important to realize that -- where individual members are identified late -- the factors of section 2.714(d) must be addressed. See Washington Public Power Supply System (WPPSS Nuclear Project No. 2), LBP-79-7, 9 NRC 330, 336 (1979) (section 2.714(a)(3) is not "an open invitation for an organization whose membership is far removed from the facility . . . to later try to recruit individuals in the vicinity [of the site] as members and gain a retroactive recognition of interest").

2. Ms. Marucci

Ms. Marucci filed a nontimely petition, postmarked May 29, and has made no attempt to address the five lateness factors of 10 C.F.R. § 2.714(a)(1) in the additional time allowed by the Licensing Board. As a result, she also has failed to satisfy the requirements and should not be admitted as a party.

3. Mr. Pray

Mr. Pray filed a nontimely petition, postmarked May 29, 1992. Although he states in his July 2, 1992, letter to the Licensing Board that "[m]y letter was indeed forwarded in a timely fashion," he provides no justification for that statement, other than to note that he contacted John Stolz of the NRC Staff.

A call to the NRC Staff cannot excuse lateness. "Where petitions are filed in the last ten (10) days of the notice period, it is requested that the petitioner promptly so inform the Commission . . . ." 57 Fed. Reg. at 17935. The telephone call is requested by the Commission as notice that petitions have been filed near the end (not after the end) of the stated period. Presumably, this call is intended to alert the Staff of a pending hearing request in the event that such a request would enter into the Staff's plans for issuing an amendment. Mr. Pray's lateness in a proceeding before the Licensing Board is not excused by such a telephone call.

Importantly, Mr. Pray did not avail himself of the additional time offered by the Licensing Board in its July 29 Memorandum and Order to address the five lateness factors of 10 C.F.R. § 2.714(a)(1). The Licensing Board specifically highlighted the factors specified in section 2.714(a)(1)(i)-(v) and stated that it would consider amendments to petitions. Memorandum and Order, at 10-11. Mr. Pray has failed to satisfy the requirements and should not be admitted as a party.

4. Remaining Petitioners

Mr. Sullivan filed a nontimely petition, dated July 6, 1992; Ms. Griffiths filed a nontimely petition, dated June 29, 1992; Mr. LoSacco filed a nontimely petition, dated August 13, 1992; EARTHVISION, Inc., filed a nontimely petition, postmarked May 29, 1992; and DWC filed a nontimely petition, dated August 13, 1992. None of these parties has attempted to address the five lateness factors of 10 C.F.R. § 2.714(a)(1) in the additional time allowed by the Licensing Board. As a result, each has failed to satisfy the requirements and none should be admitted as a party.

In addition, Ms. Nowicki appears, in her July 29, 1992, letter to substitute herself for EARTHVISION, Inc., in the same manner that CCMN hopes to adopt an earlier filing date by substituting for Ms. Marucci. Ms. Nowicki states that because she lacks an organizational name, she wishes to continue the petition for a public hearing on this matter as an individual. As noted

above for CCMN, this cannot be done as a means to avoid the showing required by section 2.714(a)(1). See River Bend, ALAB-444, 6 NRC at 796. Therefore, Ms. Nowicki should be considered by the Licensing Board to be a separate entity, distinct from EARTHVISION, Inc., and responsible for meeting the Commission's requirements on her own behalf. Ms. Nowicki has failed to address the five lateness factors of 10 C.F.R. § 2.714(a)(1) in the additional time allowed by the Board.

V. ADMISSIBILITY OF PROPOSED CONTENTIONS

A. Requirements Related to Contentions

1. 10 C.F.R. Part 2.714

To be admissible, contentions must comply with the Commission's requirements of 10 C.F.R. § 2.714(b)(2):

> (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:
>
> (i) A brief explanation of the bases of the contention.
>
> (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.
>
> (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. . . .

Admissibility of contentions is to be addressed under section 2.714(d)(2), which provides that the Licensing Board shall refuse to admit a contention if:

> (i) The contention and supporting material fail to satisfy the requirements of paragraph (b)(2) of this section; or
>
> (ii) The contention, if proven, would be of no consequence in the proceeding because it would not entitle petitioner to relief.

Section 2.714 was revised to its present form by the Commission on August 11, 1989 (54 Fed. Reg. 33,168), inter alia, to "raise the threshold for the admission of contentions to require the proponent of the contention to supply information showing the existence of a genuine dispute with the applicant on an issue of law or fact." 54 Fed. Reg. at 33,168.[29/] In the Supplementary

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[29/] The regulation actually requires a genuine dispute on a material issue of law or fact. The Commission has defined a "material" issue of law or fact as one where "the resolution of the dispute would make a difference in the outcome of the (continued...)

Information accompanying the issuance of the final rule, the Commission emphasized that contentions cannot be admitted when unaccompanied by supporting facts:

> [T]he rule will require that before a contention is admitted the intervenor have some factual basis for its position and that there exists a genuine dispute between it and the applicant. It is true that this will preclude a contention from being admitted where an intervenor has no facts to support its position and where the intervenor contemplates using discovery or cross-examination as a fishing expedition which might produce relevant supporting facts.

54 Fed. Reg. at 33,171.

The Commission also commented on the need for petitioners to show a genuine dispute, and specifically addressed how that dispute is to be shown:

> This will require the intervenor to read the pertinent portions of the license application, including the Safety Analysis Report and the Environmental Report, state the applicant's position and the petitioner's opposing view.

Id. at 33,170. The Commission's intent, therefore, was clear: to require some precision in the contention pleading process to ensure that a proposed contention has some factual support and that the contention would address some pertinent aspect of the application in issue.[30]

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[29] (...continued)
licensing proceeding." 54 Fed. Reg. at 33,172. This is consistent with 10 C.F.R. § 2.714(d)(2)(ii).

[30] A challenge to revised section 2.714 was denied by the U.S. Court of Appeals. In Union of Concerned Scientists v. U.S. Nuclear Regulatory Comm'n., 920 F.2d 50 (D.C. Cir. 1990), the (continued...)

2. Case Law Relevant to Admissibility of Contentions

NRC case law addressing the admissibility of contentions filed under the revised section 2.714 suggests a strict application of the rule. In Arizona Public Service Co. (Palo Verde Nuclear Station, Unit Nos. 1, 2, and 3), LBP-91-19, 33 NRC 397 (1991), the licensing board adopted a liberal interpretation of section 2.714(b), and applied rules of construction to infer a challenge by a petitioner, when none was explicitly stated. The board attributed "failure to plead that challenge to drafting oversight." 33 NRC at 407. On appeal, Arizona Public Service Co. (Palo Verde Nuclear Station, Unit Nos. 1, 2 and 3), CLI-91-12, 34 NRC 143 (1991), the Commission stated its intent that section 2.714(b)(2)(i)-(iii) be interpreted strictly: "If any one of these requirements is not met, a contention must be rejected." 34 NRC at 153 (citing the Statement of Considerations, 54 Fed. Reg. at 33,171). The Commission further stated:

> These requirements are designed to raise the Commission's threshold for admissible contentions and to require a clear statement as to the basis for the contentions and the submission of more supporting information and references to specific documents and sources which establish the validity of the contention. See 54 Fed. Reg. 33168, 33170 (August 11, 1989).

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[10](...continued)
Court compared the new (1989) section 2.714(b) to the prior version and confirmed that "[t]he new rule perceptibly heightens th[e] pleading standard" for contentions. Id. at 52. Previously, prospective intervenors were only required to set forth the bases for contentions with "reasonable specificity."

34 NRC at 154 (emphasis added).

In Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-35, 34 NRC 163 (1991), the licensing board rejected "bald conclusory allegations" as contrary to the Commission and federal pleading requirements. 34 NRC at 168. Specifically, the board addressed the requirement for specificity, in light of the availability of information. Petitioners submitted a contention that failed to provide a specific statement, as required by section 2.714(b)(2), but pleaded that they were "prevented from stating their complaint with . . . particularity" because of lack of access to the licensee's security plan. The board was willing to establish a "threshold basis" which, if shown, "would have permitted further examination of the amended security plan . . . ." However, Petitioners did not provide sufficient specificity, nor did they provide an adequate reason for the lack of specificity. According to the board, "[t]here is no reason Petitioners could not analyze or take account of information in the public record . . . to frame a contention having the required specificity in all but limited aspects . . . ." 34 NRC at 175.

B Discussion of Petitioners' Proposed Contentions

1. Analysis of CCMN's Contentions

Contention 1

That there is no basis for the NRC to contend that no significant risk is involved in the issuance of the

design change that was issued to address the criticality errors found at Millstone 2.

In this proposed contention, CCMN has not made a "specific statement of the issue" as required by 10 C.F.R. § 2.714(b)(2). Nor has the petitioner demonstrated specific portions of the Amendment, application, or NRC Safety Evaluation that it wishes to dispute. Compare 10 C.F.R. § 2.714(b)(2)(iii). To the contrary, the general statement quoted above is simply a broad, far-reaching claim, potentially addressing all aspects of the spent fuel pool design, regardless of whether such aspects are related to Amendment 158. This view of the proposed contention is only underscored by the supporting "Background" and the attached affidavits, which seem to call for wide-ranging litigation with respect to the Millstone Unit 2 spent fuel pool design and licensing basis, and also to the no significant hazards consideration determination made by the NRC Staff. Therefore, not only does this contention fail to meet NRC pleading requirements, but it is directed at matters outside the scope of a proceeding on Amendment 158. Accordingly, the proposed contention should be ruled inadmissible.

The proposed contention refers to an NRC determination of "no significant risk." It appears from the "Background" accompanying the proposed contentions that CCMN intends to say "no significant hazards consideration" when it says "no significant risk" in the contention. Specifically, CCMN states that "[o]n April 28, 1992, it was noted in the Federal [R]egister that the redesign

entailed 'No Significant Risk'." (In fact, the Federal Register notice indicated that "the NRC Staff proposes to determine that the amendment request involves no significant hazards consideration." 57 Fed. Reg. 17934 (emphasis added).) To the extent that CCMN's proposed Contention 1 would challenge the Staff's no significant hazards consideration determination, the proposed Contention addresses a matter outside this Board's jurisdiction, and must, therefore, be denied.

> The [no significant hazards consideration] determination itself is not subject to challenge in a license amendment proceeding . . . . The issue of whether the proposed amendment does or does not involve a significant hazards consideration is not litigable in any hearing that might be held on the proposed amendment because, as the Commission has observed, the finding is a procedural device whose only purpose is to determine the timing of the hearing (before or after the issuance of the amendment).

Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-90-6, 31 NRC 85, 90-91 (1990) [citation to 10 C.F.R. § 50.58(b)(6) omitted].

If CCMN actually means "no significant risk" broadly, proposed Contention 1 should be dismissed for lack of specificity under 10 C.F.R. § 2.714(b)(2)(i) and (ii), and for failure to show a genuine issue in dispute, material to this proceeding, under 10 C.F.R. § 2.714(b)(2)(iii). The proposed Contention as framed is obviously overbroad, with no focus on any specific aspect of Amendment 158 that would create a "risk." The "Background" material, including the accompanying affidavits, obviously asserts

a great many purported problems with the spent fuel pool design and the accident analyses used to support that design. However, these concerns are never coherently articulated in a contention. It is not incumbent upon either the Licensee or the Licensing Board to comb through the material provided by a would-be intervener to find what are the "real" proposed contentions. Moreover, the petitioner . this case has not attempted to tie specific concerns to the Amendment at issue. Instead, the material provided seems only to assert general concerns with the NRC's acceptance criteria for spent fuel pools, with the single failure criterion, with the fuel pool accident analyses, and with NNECO's handling of the July 6, 1992, Loss of Normal Power event at Millstone Unit 2 (completely unrelated to Amendment 158). None of these matters is within the scope of this proceeding -- which is limited to a specific Amendment adding restrictions on spent fuel storage.

Contention 2

That an environmental and health study needs to be done so we can know the effects from releases of varying amounts of the current allowable radioactive inventory of the spent fuel pool.

The NRC Staff addressed this issue in its Safety Evaluation ("SER") related to Amendment No. 158,[11] section 6.0, "Environmental Consideration":

> The NRC staff has determined that the amendment involves no significant increase in the amounts, and no significant change in the types of any effluents that may be released offsite, and that there is no significant increase in individual or cumulative occupational radiation exposure. . . . Accordingly, the amendment meets the eligibility criteria for categorical exclusion set forth in 10 CFR 51.22(c)(9). Pursuant to 10 CFR 51.22(b) no environmental impact statement or environmental assessment need be prepared in connection with the issuance of the amendment.

CCMN provides no basis to dispute this determination in support of its contention.[12]

The Appeal Board in Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 and 2), ALAB-291, 2 NRC 404, 415 (1975), noted that when a Licensing Board is faced with an open-ended re-exploration of environmental issues which "have already been canvassed by the Board in the construction permit proceeding," the licensing board should not "embark broadly upon a fresh assessment

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[11] "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, Enclosure 2 to NRC letter from Guy S. Vissing to Mr. John F. Opeka, June 4, 1992.

[12] Similarly, Mr. LoSacco and DWC call for Environmental Impact Statements under NEPA in their August 13 and June 26 petitions, respectively. The SER has addressed this issue and noted that additional environmental assessments are unnecessary.

of the environmental issues which have already been thoroughly considered and which were decided in the initial decision." In our case, the environmental effects of the spent fuel pool, under both normal and accident conditions, were analyzed during initial plant licensing. With respect to Amendment 158, the NRC Staff in its Safety Evaluation has concluded that there will be no resulting significant effects on the environment. To the extent that this proposed contention would address environmental effects limited to Amendment 158, it fails for lack of specificity and basis, for lack of any facts or expert opinion to support the Contention, and for a failure to show that a genuine dispute exists on a material issue of law or fact. To the extent it addresses the fuel pool generally, it is outside the scope of the proceeding.

Contention 3

That the removal of requirements for neutron flux monitors in the Millstone spent fuel pool was improper in light of the fact that before the license amendment was issued to allow no inpool criticality monitors the NRC was aware that the criticality safety margins were being questioned. Therefore we contend that without criticality monitors in that pool we will have no prior warning if a dangerous neutron multiplication were to occur.

This proposed contention is based on a misunderstanding by the petitioner of a previous exemption and license amendment granted to NNECO by the NRC. The proposed contention addresses a matter clearly outside the scope of the present proceeding.

Criticality monitors are not typically installed in commercial power plant fuel pools. Criticality monitors are required for facilities which process special nuclear material, such as fuel fabrication facilities. See 10 C.F.R. § 70.24. Such monitoring was never intended for the storage of fuel at commercial power plants, and has never been installed in the Millstone Unit 2 spent fuel pool. However, a routine exemption from the criticality monitoring requirement inadvertently was omitted from the Millstone Unit 2 operating license. Because of this omission, Northeast Utilities applied for, and on October 18, 1991 was granted, an exemption pursuant to 10 C.F.R. §§ 70.14 and 70.24(d).

Millstone Unit 2 does, however, maintain gamma radiation monitors above the spent fuel pool. These monitors alert operators to radioactive releases in the vicinity of the fuel pool and automatically initiate emergency filtration systems that remove most radioactive particles in the air, such as Cs-137 and Sr-90. NNECO did not request permission, and the NRC did not authorize NNECO, to remove these monitors from service. In an amendment issued on May 20, 1992, the NRC did grant permission to change the name of these monitors from "criticality monitors" to "radiation monitors."[33] Again, this name change (while obviously ministerial in nature, conforming the license to the actual plant configuration

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[33] See Northeast Nuclear Energy Company [et al.] Docket No. 50-336 Millstone Nuclear Power Station, Unit No. 2 Amendment to Facility Operating License, Amendment No. 157, License No. DPR-65 (May 20, 1992).

which has no criticality monitors) is not, and cannot be, in issue in this proceeding.

The scope of this proceeding, as defined by the Commission, is whether Amendment 158 should be issued -- not whether the NRC should rescind an equipment name change authorized by a prior license amendment (misconstrued by CCMN) and not whether a prior exemption was appropriate. Accordingly, the proposed contention should not be admitted.

Contention 4

That immediate action should be taken to stop NU from contaminating the new steam generators until our concerns for the safe storage of the spent and new fuel is addressed.

In proposed Contention 4, CCMN has again failed to state a valid contention. There is no statement of law or fact to be raised or controverted, and there is no showing that a genuine dispute exists on an issue within the scope of the present proceeding. The merits and timing of a decision to restart Millstone Unit 2 following completion of the steam generator replacement project, the costs of the steam generator replacement, and NNECO's business risks inherent in steam generator replacement, are not within the scope of this proceeding. See Pebble Springs, CLI-76-26, 4 NRC at 614; Seabrook, CLI-84-6, 19 NRC at 978. Thus, proposed Contention 4 does not meet the requirements of 10 C.F.R. § 2.714(b)(2) and should not be admitted.

2. No Petitioners Other than CCMN Filed Contentions

The Licensing Board's July 29, 1992, Memorandum and Order established a schedule by which all petitioners were to submit a list of proposed contentions no later than August 14, 1992. No petitioner other than CCMN has filed proposed contentions in accordance with the schedule established by the Board's Order. "A petitioner who fails to file a supplement that satisfies paragraph (b)(2) of this section with respect to at least one contention will not be permitted to participate as a party." 10 C.F.R. § 2.714(b)(1). Accordingly, all other petitions to intervene must be categorically denied for lack of an admitted contention.

Moreover, further leave to amend the petitions should not be afforded in this matter. The Licensing Board itself "recommend[ed] 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." Memorandum and Order, at 9. Further, as addressed earlier, the Commission has previously emphasized that all parties to its proceedings are expected to live up to applicable regulations and obligations. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981). The Licensing Board has already provided petitioners with substantial latitude and guidance, and further opportunities to repair defective pleadings are not warranted. The resources of the NRC and NNECO can be much better spent on matters of more importance to public health

and safety. Accordingly, the petitions of Ms. Marucci (as an individual), Ms. Nowicki, EARTHVISION, Inc., Mr. Sullivan, Mr. Pray, Ms. Griffith, DWC, and Mr. LoSacco should be dismissed for failure to respond to the Licensing Board's Memorandum and Order, and for failure to comply with the requirements of 10 C.F.R. § 2.714(b).

VI. CONCLUSION

For the reasons stated above, and in NNECO's prior responses to the earlier petitions, all of the various intervention petitions and requests for a hearing should be denied. Likewise, all of the proposed contentions should be deemed inadmissible. NNECO summarizes its positions with respect to each petitioner below.

A. CCMN has failed to meet the requirements for intervention and should not be admitted as a party to this proceeding. CCMN has not identified the members it intends to represent in this proceeding; it has not shown sufficient organizational interest or interest of its members to confer standing to intervene as an organization; it filed a petition almost one month late and has not addressed the five lateness factors as required; it failed to answer the Licensing Board's Questions; and it has not submitted an admissible contention.

B. Mary Ellen Marucci should not be admitted as a party to this proceeding as an individual. She has not demonstrated an interest sufficient to confer standing; she filed a nontimely petition, postmarked after the end of the published time for filing,

and has not addressed the five lateness factors as required by the Board and by 10 C.F.R. § 2.714(a)(1); she failed to answer the Licensing Board's Questions; and she has not submitted proposed contentions in accordance with the Board's July 29 Memorandum and Order.

C. EARTHVISION, Inc., apparently no longer exists and should be denied status as an intervenor on that basis alone. If EARTHVISION is permitted to remain as an organizational petitioner, its petition should nonetheless be denied. EARTHVISION has not shown sufficient organizational interest to confer standing nor has it identified any members with standing whose interests it would represent.

D. Ms. Nowicki as an individual also should not be admitted. Ms. Nowicki should not be permitted to substitute herself for EARTHVISION. Even if such latitude were allowed, however, her petition to intervene should still be denied. Ms. Nowicki has not shown sufficient interest to confer standing; she filed a nontimely petition and has not addressed the five lateness factors as required; she failed to answer the Licensing Board's Questions; and she has not submitted proposed contentions in accordance with the schedule established by the Licensing Board.

E. Mr. Pray's petition to intervene should be denied. Mr. Pray has not shown sufficient interest to confer standing; he filed a nontimely petition and has not addressed the five lateness factors as required; he failed to answer the Licensing Board's Questions;

and he has not submitted proposed contentions in accordance with the schedule established by the Licensing Board.

F. Ms. Griffiths' petition, Mr. Sullivan's petition, Mr. LoSacco's petition, and DWC's petition should each be denied. None of these petitioners has showr sufficient interest to confer standing; each filed a nontimely petition and none has addressed the five lateness factors as required; all have failed to answer the Licensing Board's Questions; and none has submitted an admissible contention.

Respectfully submitted,

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Dated at Washington, D.C.,
this 8th day of September, 1992