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USNRC  
September 25, 1998

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY  
RULEMAKING AND  
ADJUDICATIONS STAFF

BEFORE THE COMMISSION

In the Matter of	)	
	)	
Northeast Nuclear Energy Company	)	Docket No. 50-423-LA-2
	)	
(Millstone Nuclear Power Station,	)	
Unit No. 3)	)	

NORTHEAST NUCLEAR ENERGY COMPANY'S  
BRIEF IN OPPOSITION TO APPEAL RE: STANDING

I. INTRODUCTION

By Notice of Appeal dated September 11, 1998, the Citizens Regulatory Commission ("CRC") appealed the Memorandum and Order (Resolving Standing Issues), LBP-98-22, of the Atomic Safety and Licensing Board ("Licensing Board") of September 2, 1998. Pursuant to 10 C.F.R. § 2.714(a), Northeast Nuclear Energy Company ("NNECO") herein responds in opposition to the appeal. The Licensing Board correctly ruled that CRC did not meet the requirements of 10 C.F.R. § 2.714(a)(2) and did not demonstrate a concrete harm traceable to the license amendment that is the subject of this proceeding. The Licensing Board correctly denied CRC's petition.

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## II. BACKGROUND

### A. Facts

This proceeding relates to NNECO's License Amendment Request of April 1, 1998 for Millstone Unit 3. The relevant facts regarding the License Amendment Request at issue are recited in the Licensing Board's Memorandum and Order:

... the Millstone containment substructure is encased within a waterproof rubber membrane that is connected to sumps located in the building housing the Engineered Safety Features ("ESF"). The original plant design relied upon the waterproof membrane to ensure that groundwater inleakage was minimal and would not impact safety-related structures and components. Millstone, therefore, had only nonsafety-related sump pumps to pump groundwater from the sumps in the ESF building. As nonsafety-related equipment, the sump pumps were not powered from the emergency busses and were not accessible to plant personnel during a design basis loss of coolant accident. Thus, the pumps could not be assumed to be available for mitigating such a design basis accident.

According to the amendment application, a recent restart review revealed that the waterproof membrane has degraded allowing groundwater inleakage. The leakage has the potential to flood the ESF building sump, if the existing nonsafety-related sump pumps fail to operate. Further, if the sumps are not pumped out, the groundwater leakage eventually could affect both trains of the [Recirculation Spray System ("RSS")]. In a filing providing supplemental information to the amendment application, the Applicant indicates that RSS pump operability could be affected in 138 days from ESF building sump overflow. Because the existing nonsafety-related sump pumps cannot be credited to operate during accident and post-accident conditions, the Applicant has installed two independent, safety-related, air driven sump pumps in the ESF building to eliminate the potential for groundwater inleakage that could affect the RSS pumps. Each air driven motor pump is

powered by a portable nonsafety-related air compressor using permanent connections located outside the ESF building so the connections are accessible during post accident conditions. The compressors are housed in designated locations, maintained and periodically tested to ensure their availability, and will be connected subsequent to an accident when sump pump operation is required. The current license amendment seeks to revise the Millstone Unit 3 licensing basis to add to the existing sump pump system this new sump pump subsystem in the Final Safety Analysis Report.

LBP-98-22, slip op. at 2-4.

B. Proceedings Below

CRC filed its first request for hearing and petition to intervene with respect to this License Amendment Request on May 21, 1998. At the time, the Commission's requirements with respect to intervention petitions were abundantly available and clear to the petitioner -- including in 10 C.F.R. § 2.714(a)(2) and in the April 22, 1998 *Federal Register* Notice offering an opportunity for hearing on NNECO's application.<sup>1/</sup> CRC would need to:

. . . 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.

10 C.F.R. § 2.714(a)(2) (emphasis added).

CRC, in basing its organizational standing on the standing of its members, would need in its showing to establish for one of its members:

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<sup>1/</sup> With respect to the latter, the instructions regarding intervention petitions were published at 63 Fed. Reg. 19964, col. 2; the application itself was noticed at 63 Fed. Reg. 19974.

. . . a concrete and particularized injury that is fairly traceable to the challenged action and likely to be redressed by a favorable decision. See generally Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992); Perry, 38 NRC at 92. Injury may be actual or threatened. Kelly v. Selin, 42 F.3d 1501, 1508 (6th Cir. 1995); Wilderness Soc'y v. Griles, 824 F.2d 4,11 (D.C. Cir. 1987). . . .

Georgia Institute of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995).

CRC's first petition was unequivocally deficient. The petition was a "cut and paste" version of an earlier petition addressing a separate and unrelated license amendment application.<sup>2/</sup> CRC did not assert, much less demonstrate, any particularized harm that could result from the new safety-related sump pumps, or even from the groundwater inleakage those sump pumps address. CRC's petition instead was a generalized assault on NNECO's management skills and motives, engineering competence, other recent RSS modifications and operating experience as described in a press account,<sup>3/</sup> the "employee environment" at Millstone Station, and the compensation and alleged motives of NNECO's management. From the filing it was clear to NNECO that CRC's issue was not the sump pump approval, but rather restart of Millstone Unit 3 (which in April 1998, was approaching and was a matter before the Commission). NNECO responded to the intervention

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<sup>2/</sup> CRC's earlier request for hearing and petition for leave to intervene was filed on April 23, 1998. That petition related to a proposed change in the licensing basis for the Recirculation Spray System. NNECO's amendment application on that matter was filed March 3, 1998. That proposed amendment would update the licensing basis to reflect a 1986 change in the operation of the RSS, eliminating direct injection from the RSS pumps to the Reactor Coolant System during recirculation phases of post-accident operation. That matter remains pending before an Atomic Safety and Licensing Board.

<sup>3/</sup> The modifications and experience obliquely described by CRC in the petition, did not relate to either the sump pump issue or the 1986 licensing basis change that is the subject of the separate amendment application described in footnote 2.

petition on June 5, 1998, pointing out the defects in the petition quite plainly, and requesting that the petition be denied.<sup>4/</sup> The NRC Staff did the same on June 10, 1998.<sup>5/</sup>

On June 16, 1998, the Licensing Board issued a Memorandum and Order allowing CRC an opportunity to amend its intervention petition -- both with respect to the standing inadequacies and to propose contentions. In effect, CRC now had until July 7, 1998, to adequately demonstrate standing and meet requirements clearly described in the April 22, 1998 *Federal Register* Notice.

CRC filed a supplement to its intervention petition on July 7, 1998, and this supplemental petition was still deficient. CRC provided what was purported to be an "affidavit addressed to the standing of CRC" and asserted the importance of the RSS, but in fact CRC did not otherwise attempt to address either the requirements of 10 C.F.R. § 2.714(a)(2) or the sump pump subsystem. The affidavit was from a member of CRC who lives near Millstone Station. The affidavit -- much like the original petition -- was a boilerplate affidavit borrowed from a filing in the separate license amendment matter related to operation of the RSS. CRC, for standing, relied upon the standing of its member. In the affidavit, the member in turn relied upon no more than proximity of residence to Millstone, and the potential for offsite consequences due to "an accident at Millstone." There was no nexus drawn to NNECO's License Amendment Request.

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<sup>4/</sup> "Northeast Nuclear Energy Company's Answer to Request for Hearing and Petition to Intervene: Sump Pump Subsystem Approval," June 5, 1998.

<sup>5/</sup> "NRC Staff's Response to Citizens Regulatory Commission's Petition to Intervene," June 10, 1998.

NNECO again responded to this supplemental petition on July 21, 1998,<sup>6/</sup> pointing out CRC's failure to meet the fundamental NRC pleading requirements related to standing. The NRC Staff did likewise on the same date.<sup>7/</sup> As ultimately observed by the Licensing Board in its Memorandum and Order, neither CRC nor the affiant addressed the sump pump subsystem at issue in this proceeding, alleged how the sump pump subsystem (credited for post-accident operation) could lead to an accident at Millstone, or how "the installation of the new safety-related sump pump subsystem fails to address or improperly addresses the problem of groundwater leakage and how that deficiency will lead to offsite consequences." LBP-98-22, slip op. at 11.

CRC now claims error and, on appeal, attempts to argue that it has standing on this matter. CRC's attempt is both too late and too little.

### III. ARGUMENT

#### A. CRC Has Failed In Two Previous Opportunities To Establish Standing

As recited above, CRC has had two opportunities to establish standing in this case -- to allege, with particularity, how offsite consequences could result from the sump pump subsystem at issue in this amendment proceeding.

In two opportunities, CRC has failed. CRC filed a boilerplate petition in the first instance, and a boilerplate affidavit in the second. Lacking any focus whatsoever on the issues germane to the sump pump subsystem amendment, CRC's filings were inadequate. The Licensing

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<sup>6/</sup> "Northeast Nuclear Energy Company's Supplemental Answer Regarding Standing Issues (Sump Pump Subsystem Amendment)," July 21, 1998.

<sup>7/</sup> "NRC Staff's Response to CRC Supplement to Intervention Petition Addressing Standing," July 21, 1998.

Board correctly ruled on this basis, and there is no reason for the Commission to consider the matter any further.

These two CRC filings, in their most favorable light, seek standing based upon no more than the nearby residence of one member of CRC. However, the Commission has previously held that in a license amendment case nearby residence alone is insufficient to establish standing; petitioners must allege a clear potential for offsite consequences resulting from the amendment. See Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989); cf. Sequoyah Fuels Corp. (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72-74 (1994) (focusing on whether alleged injury is "concrete and particularized" and whether there is a "realistic threat" of direct injury). CRC merely repeated verbiage from its earlier petition and affidavit *in another proceeding* aimed generally at Millstone management and the RSS. CRC never plausibly articulated how the sump pump subsystem would cause offsite harm, or even how it would be inadequate to redress the problem that gave rise to the design change at issue.

With two bites at the proverbial apple already eaten, an appeal is not the time for CRC to attempt to establish its standing. Both well-established law and good policy dictate that this matter end here. See, e.g., Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC \_\_\_\_, slip. op. at 2 (July 28, 1998) ("The Commission emphasizes its expectation that the [licensing] boards will enforce adherence to the hearing procedures set forth in the Commission's Rules of Practice in 10 C.F.R. Part 2. . .").

B. Collateral Estoppel and Res Judicata Have No Relevance To Standing In This Case

In the separate proceeding mentioned above involving a change to operation of the RSS during the recirculation phases of post-accident operation, the presiding Licensing Board has found that CRC has standing to intervene. LBP-98-20, 48 NRC \_\_\_\_ (August 25, 1998). On appeal

with respect to the present sump pump matter, CRC argues that the Licensing Board is bound by the doctrines of *collateral estoppel* and *res judicata*, and as such must find that CRC has standing to intervene.

This theory does not hold. NNECO has applied for two distinctly different license amendments. While both involve in some way the RSS, the two amendments involve two very different design changes. There were two different *Federal Register* Notices offering two different opportunities for hearing, and there are now two different licensing proceedings. CRC's obligation with respect to standing was to show how its interests might be affected in each case, how it could suffer an offsite harm traceable to the particular amendment in each case, and how that harm could be redressed in the particular proceeding. Quivira Mining Co. (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC \_\_\_\_ (slip op at 5) (July 17, 1998).

Neither *collateral estoppel* nor *res judicata* would apply under these circumstances. For *res judicata* to apply, there must be, in two proceedings, identical causes of action; for *collateral estoppel* to apply, there must be, in two proceedings, identical issues. See, e.g., Parklane Hosiery Co. v Shore, 439 U.S. 322, 326 at 5 (1979).<sup>8/</sup> With respect to NNECO's two amendment applications, there is not an identical cause of action -- the license amendments are clearly different and the remedies requested by CRC are accordingly different. And, in the two applications, there is not an identical issue with respect to standing -- rather, the facts differ and CRC must show in each case a particularized harm from the specific amendment proposed by NNECO in that case.

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<sup>8/</sup> See also Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-27, 10 NRC 563, 565-866 (1979).



Boilerplate recitations by CRC do not satisfy the standing requirements precisely because the facts of the approvals are so very different.<sup>9/</sup>

C. CRC's Allegations on Appeal Are Still Off Point and Unsatisfactory

CRC, in its appeal brief, argues that the Licensing Board's decision is "arbitrary," that the license amendment (presumably, CRC means the safety-related sump pump subsystem) is "a band-aid approach to a serious safety issue," and that CRC's members must have standing because they live at "ground zero." By this argument, CRC essentially shifts its argument from the previous focus on NNECO's management and competence, and the history of the RSS generally, to groundwater leakage and the membrane encasing the containment substructure. However, even if one were willing to view this as a very tardy attempt to show CRC's standing, it is still inadequate.

In the end, CRC is still relying upon nearby residence of one member to establish its organizational standing. Historically, the Commission has been willing to presume the potential for injury to nearby residents in cases involving the construction or operation of the reactor itself, because there is a clear potential for offsite consequences. But the Commission has contrasted cases that involve minor license amendments such as the present one: "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 . . ." St. Lucie, CLI-89-21, 30 NRC at 329-30 (emphasis added).

In light of this precedent, the Licensing Board correctly found that:

At a bare minimum, CRC must show how the installation of the new safety-related sump pump subsystem fails to address or improperly addresses the problem of groundwater leakage and how that

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<sup>9/</sup> For a concise description of the approval involved in the other license amendment proceeding, see "Northeast Nuclear Energy Company's Answer to Request for Hearing and Petition to Intervene," filed on Docket 50-423-LA, on May 22, 1998, at 2-3.

deficiency will lead to offsite consequences. CRC's intervention filings make no such showing.

LBP-98-22, slip op. at 11.

CRC's focus in the appeal brief on groundwater leakage and the degraded membrane may state a problem, but CRC still does not establish any potential for offsite injury traceable to either, or to the amendment at issue. NNECO has acknowledged that the membrane is degraded, that there is groundwater leakage, and that unabated groundwater leakage may eventually affect the RSS. However, the safety related sump pump subsystem at issue is designed precisely to address *and prevent* an inoperable RSS during long-term post-accident operation.<sup>10/</sup> Likewise, the licensing basis document change included with the amendment application is intended to show the leakage issue, the volume of water involved, and how it is addressed. The mere fact of groundwater leakage does not equate to a "realistic threat" of offsite injury traceable to this amendment or redressable in this proceeding.<sup>11/</sup> It is still incumbent upon CRC to demonstrate, with particularity, how offsite consequences could result. CRC must show a plausible chain of events from the leakage problems, through the safety-related sump pumps, to potential offsite consequences. CRC did not do so in its pleadings below, and has not done so on appeal.

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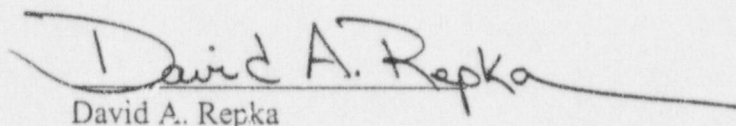
<sup>10/</sup> CRC, in passing, calls the sump pump subsystem a "band aid" on the problem of groundwater leakage. This is, however, never explained. No problem allegedly created by the groundwater other than that addressed by the sump pump subsystem is ever described.

<sup>11/</sup> As the Licensing Board correctly noted, if one takes no credit for either the pre-existing non-safety related sump pumps or the new safety-related sump pumps, RSS pump operability would not be affected until 138 days from ESF building sump overflow (which would hypothetically occur in the hours following the accident). Moreover, the safety-related sump pump subsystem itself includes two pumps, either of which is capable of protecting both RSS pumps. Moreover, the air compressors that support the sump pump subsystem are accessible and can be serviced or replaced to assure long term operation.

#### IV. CONCLUSION

CRC's appeal should be denied. The Commission in its recent policy statement made its expectations clear. The Licensing Board considered CRC's serial filings, considered the relevant information, and did not err. The Licensing Board correctly concluded that CRC did not satisfy the requirements of 10 C.F.R. § 2.714(a)(2), and that CRC lacks sufficient interest to intervene in this license amendment proceeding.

Respectfully submitted,

A handwritten signature in black ink that reads "David A. Repka". The signature is written in a cursive style with a long horizontal line extending to the right.

David A. Repka

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Dated in Washington, D.C.  
this 25th day of September, 1998

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
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Unit No. 3) )

OFFICE OF SECRETARY  
RULEMAKING AND  
ADJUDICATIONS STAFF

Docket No. 50-423-LA-2

CERTIFICATE OF SERVICE

I hereby certify that copies of "NORTHEAST NUCLEAR ENERGY COMPANY'S BRIEF IN OPPOSITION TO APPEAL RE: STANDING ISSUES," in the above-captioned proceeding, have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk (\*) by hand delivery service, or as marked by two asterisks (\*\*), by overnight delivery, this 25th day of September, 1998. For those parties marked by a diamond (◇), a courtesy copy has also been provided this same day by e-mail.

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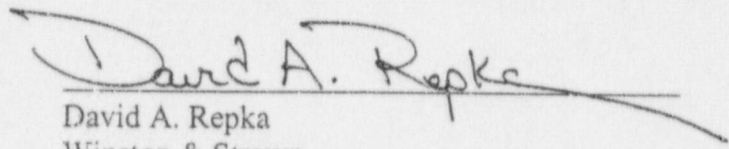
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