

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

DOCKETED 07/02/03
SERVED 07/02/03

In the Matter of)
)
CONNECTICUT YANKEE ATOMIC POWER)
COMPANY)
)
(Haddam Neck Plant)
License Termination Plan))
_____)

Docket No. 50-213-OLA

CLI-03-07

MEMORANDUM AND ORDER

In this license termination proceeding for Connecticut Yankee Atomic Power Company's ("CY"'s) commercial nuclear reactor at Haddam Neck, Citizens Awareness Network ("CAN"), an intervenor, has filed a petition directly with the Commission. CAN's petition raises the question whether NRC's radiological criteria for license termination¹ allow excessive radioactive residue at Haddam Neck after decommissioning and are thus "inimical" to the health and safety of children. CAN's petition also asks the Commission to direct the Licensing Board to accept a late-filed amended contention related to potential radiation doses to children. We deny the petition in its entirety.

¹ See 10 C.F.R. § 20.1402 (dose standard for a site's "unrestricted use" is 25 mrem/year).

I. BACKGROUND

This proceeding concerns a license amendment application seeking approval of a License Termination Plan (“LTP”) for the Haddam Neck nuclear power plant. CAN and the Connecticut Department of Public Utility Control requested a hearing and submitted contentions. The Board granted the requests of both petitioners and admitted some of their contentions, including CAN’s Contention 6.1, which raises the question whether certain parameters used by CY in determining compliance with release criteria in 10 C.F.R. Part 20, Subpart E, are sufficiently conservative.² In particular, CAN asserts that the dose modeling calculation in CY’s LTP is flawed because CY did not calculate doses to children.

CY moved for reconsideration of the Board’s decision to admit CAN Contention 6.1 in limited form. The Board denied the motion and directed the parties to address the following question in their presentation of evidence:

What are the appropriate factors and considerations relating to the “outdoors value,” yearly intake of water by residents, and the nature of and extent to which the characteristics of children must be taken into account in calculating the TEDE³ to the “average member of the critical group” in the “resident farmer scenario,” for purposes of the Haddam Neck site License Termination Plan, in order that the LTP can “demonstrate[] that the remainder of decommissioning activities . . . will not be inimical . . . to the health and safety of the public,” as required by 10 C.F.R. § 50.82(a)(10)?⁴

²See *Connecticut Yankee Atomic Power Co. (Haddam Neck Plant)*, LBP-01-21, 54 NRC 33 (2001). The Connecticut Department of Utility Control later withdrew its contentions and secured government participant status before the evidentiary hearing.

³Total effective dose equivalent.

⁴LBP-01-25, 54 NRC 177, 197 (2001).

CY asked the Commission to review the Board's decision to admit the portion of CAN Contention 6.1 that pertained to children. Finding that CY's petition did not meet our standards for interlocutory review, we denied it.⁵

During a 5-day evidentiary hearing in mid-March, CAN announced its intention to file an amended contention based on information in a new U.S. Environmental Protection Agency publication. The proposed amended contention states:

NRC regulations at 10 C.F.R. 50.82(a)(10) preclude NRC approval of a license termination plan unless the NRC finds, among other things, that decommissioning activities will not be inimical to the health and safety of the public. Contrary to this requirement, the LTP is not adequate to protect the health and safety of children, because it fails to account for the higher risk to children posed by the levels of residual radiation CY[] poses [*sic*] to leave at the Haddam Neck site.⁶

CAN asked the Board to hold the record open pending a Commission decision on a related petition, which it filed directly with the Commission three days later.

The petition before us asks the Commission to consider whether the 25 mrem/year dose standard set out in 10 C.F.R. § 20.1402 ensures that decommissioning activities are "not inimical" to the health and safety of children in satisfaction of 10 C.F.R. § 50.82(a)(10)⁷ and

⁵See CLI-01-25, 54 NRC 368 (2001).

⁶"Citizens Awareness Network's Request for Admission of Late-Filed Amended Contention 6.1, Request that Consideration be Held in Abeyance, and Request to Hold the Record Open," at 5 (Apr. 11, 2003).

⁷"If the license termination plan demonstrates that the remainder of decommissioning activities will be performed in accordance with the regulations in this chapter, *will not be inimical to the common defense and security or to the health and safety of the public*, and will not have a significant effect on the quality of the environment and after notice to interested persons, the Commission shall approve the plan, by license amendment" 10 C.F.R. § 50.82(a)(10) (emphasis added).

requests that we direct the Board to accept Amended Contention 6.1. Both the licensee and the NRC Staff oppose CAN's petition.⁸

II. DISCUSSION

A. Challenges to NRC Regulations in Individual Adjudicatory Proceedings

There are two vehicles available for making a request to avoid application of an NRC rule in an individual adjudicatory proceeding. First, a party may petition for rulemaking under 10 C.F.R. § 2.802 and make a concurrent request that the Commission suspend a licensing proceeding to which the rulemaking petitioner is a party pending disposition of the petition for rulemaking. Second, a party may request waiver of a rule under 10 C.F.R. § 2.758(b).⁹ We are not certain how to label CAN's petition, which asks the Commission, in effect, to re-evaluate the adequacy of our current decommissioning standard of 25 mrem/year *in this individual adjudicatory proceeding*. Regardless of what we call it, CAN's petition falls short under either the rulemaking or waiver standard. Accordingly, we decline to consider the merits of CAN's specific arguments here.

1. *Rulemaking Petition*

⁸CY, expressing doubts about whether a responsive pleading to CAN's petition in the nature of a rulemaking petition is required or permitted, moved for leave to file its response on May 6, 2003. We grant the motion and accept CY's pleading for consideration.

⁹Although § 2.758 applies by its specific terms to proceedings "involving initial or renewal licensing" subject to 10 C.F.R. Subpart G, we routinely apply the rule to license amendment cases. *See, e.g., Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 211, n. 14 (1998) (challenge to a reactor license termination plan); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 364 (2001), *reconsideration denied* CLI-02-1, 55 NRC 1 (2002), (license amendment case). *Cf. North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 217 n.8 (1999) (citing 10 C.F.R. § 2.1329, license transfer proceeding rule analogous to § 2.758).

“Agencies are free either to determine issues on a case-by-case basis through adjudications or . . . to resolve matters generically through the rulemaking process.”¹⁰ “Otherwise, the agency would be required ‘continually to relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding.’”¹¹ By promulgating 10 C.F.R. § 20.1402, the rule on site release criteria, the Commission has decided that all sites should be subject to a uniform 25 mrem per year dose standard. Thus, the Commission has prescribed “the pertinent standards for termination of [a] reactor license;” these standards are “not subject to challenge or litigation in an adjudication.”¹² While it is true, as CAN stresses, that our license termination rule requires the NRC to find that decommissioning activities will not be “inimical” to the public health and safety, by definition compliance with our safety standards satisfies the “not inimical” requirement in areas covered by the standards.¹³

If our safety regulations are in any way inadequate and need revision, the appropriate vehicle to ask the Commission to set a new standard is a petition for rulemaking under 10 C.F.R. § 2.802.¹⁴ This regulation describes the procedure for filing the petition as well as its

¹⁰*Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 474 (2001), quoting *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 343 (1999), citing *Heckler v. Campbell*, 461 U.S. 458, 467 (1983).

¹¹*Oconee* at 343, quoting *Heckler* at 467.

¹²*Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 211, n. 14 (1998). See also 10 C.F.R. § 2.758. We note that CAN was an intervenor in the *Yankee Atomic* case.

¹³See *Maine Yankee Atomic Power Co.* (Maine Yankee Nuclear Power Plant, Unit 2), ALAB-161, 6 AEC 1003, 1010 (1973), *aff'd* CLI-74-2, 7 AEC 2 (1974), *aff'd sub nom. Citizens for Safe Power v. NRC*, 524 F.2d 1291 (D.C. Cir. 1975). See also *Dairyland Power Cooperative* (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 522 (1982) (A showing that releases comply with 10 C.F.R. Part 50, Appendix I design objectives establishes conformance to ALARA requirement in regulations and “it follows that the emissions are . . . [not] inimical to public health and safety.”)

¹⁴“Any interested person may petition the Commission to issue, amend or rescind any regulation.” 10 C.F.R. § 2.802(a). See *Public Service Co. of New Hampshire* (Seabrook

contents. To protect its position, the rulemaking petitioner “may request the Commission to suspend all or any part of any licensing proceeding to which the petitioner is a party pending disposition of the petition for rulemaking.”¹⁵ If the petition meets initial screening requirements, the Commission may publish notice of the proposed rulemaking and provide an opportunity for public participation by submitting comments.

Rulemaking is an exercise of the NRC’s legislative authority, rather than its adjudicatory authority. Unlike an individual adjudication, a rulemaking proceeding provides *all* interested persons -- the general public as well as licensees -- a ready avenue to submit formal comments for the agency’s consideration and response. Such extensive public participation is especially suitable in a rulemaking, for the final rule will apply to all licensees, unless special circumstances are shown, as described below.

Although CAN’s adjudicatory petition bears some resemblance to a rulemaking petition, CAN has not expressly asked for a generic revision to rules involving all sites where children could potentially be exposed to radiation from decommissioning activities. It would be unfair to CY (and all other interested persons) to consider, in an individual adjudicatory proceeding, a rule change that CAN has not formally pursued. Adjudications do not provide a forum to consider rule changes.

2. Rule Waiver Request

When special circumstances exist at a particular site, our adjudicatory rules provide a mechanism for requesting a waiver of an otherwise controlling safety regulation. In that case, a

Station, Units 1 and 2), CLI-89-8, 29 NRC 399, 416 (1989) (“An adjudicatory licensing hearing is not a permissible forum for a challenge to Commission regulations. . . . Such a challenge may be brought by means of a petition for rulemaking.”)

¹⁵10 C.F.R. § 2.802(d).

party to an individual adjudicatory proceeding may request a waiver for that proceeding only.¹⁶ “The sole ground for petition for waiver or exception shall be that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation . . . would not serve the purposes for which the rule or regulation was adopted.”¹⁷ Waiver of a Commission rule is simply not appropriate for a generic issue.¹⁸

Here, CAN says that 10 C.F.R. § 20.1402's 25 mrem/year standard is inadequate to protect children from a latent cancer risk. But this cancer risk on its face is a generic concern having no singular significance at Haddam Neck. Without referring to any special circumstances peculiar to the Haddam Neck site, CAN simply asks the Commission to reconsider the standard itself.¹⁹ We will not do so in this adjudicatory proceeding.²⁰ Parenthetically, we must point out that the EPA report²¹ that CAN points to is a *draft* marked “DRAFT - Do not cite or quote” on each page. It does not appear to us to call into question our current 25 mrem/year standard. The draft document applies to carcinogens, not ionizing

¹⁶See 10 C.F.R. § 2.758(b).

¹⁷*Id.* See also note 9.

¹⁸See *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), CLI-80-16, 11 NRC 674, 675 (1980).

¹⁹“Citizens Awareness Network Petition for Consideration of Whether 25 mrem/Year Does Standard Ensures Decommissioning Activities Are Not Inimical to the Health and Safety of Children in Satisfaction of 10 C.F.R. § 50.82(a)(10) And Request to Direct the Licensing Board to Accept Amended Contention 6.1,” at 7 (Apr. 14, 2003) (“Petition”).

²⁰The correct way to request a rule waiver is by application to the Board, not directly to the Commission. Only if the Board determines that the petitioner has made “a prima facie showing” that the application of the specific Commission rule or regulation to “a particular aspect . . . of the subject matter of the proceeding would not serve the purposes for which the rule or regulation was adopted and that application of the rule or regulation should be waived or an exception granted” will the Board certify the matter to the Commission for decision. See 10 C.F.R. § 2.758(c)-(d).

²¹See Draft EPA/630/R-03-003, “Supplemental Guidance for Assessing Cancer Susceptibility from Early-Life Exposure to Carcinogens” (Feb. 28, 2003).

radiation; moreover, there is nothing new in the draft that was unknown when the Commission adopted the 10 C.F.R. Part 20, Subpart E, site release criteria.²²

B. Amended Contention 6.1

In conjunction with its challenge to the decommissioning dose standard, CAN has requested that the Commission direct the Board to accept Amended Contention 6.1. As CAN recognizes, consideration of Amended Contention 6.1 “requires the Licensing Board to evaluate the adequacy of the NRC’s current decommissioning standard of 25 mrem/year. The Licensing Board is precluded from undertaking such an evaluation unless the Commission either changes the standard or directs the Licensing Board to undertake the evaluation.”²³ Because we are denying CAN’s petition (via this order), we direct the Board to reject CAN’s Amended Contention 6.1.

²²See *generally* “Final Rule: Radiological Criteria for License Termination,” 62 Fed. Reg. 39,058 (July 21, 1997).

²³Petition at 1.

III. CONCLUSION

For the foregoing reasons, the Commission (1) *denies* CAN's petition to reconsider the dose standard set out in 10 C.F.R. § 20.1402; (2) *denies* CAN's request to direct the Board to accept Amended Contention 6.1; and (3) *directs* the Board to reject CAN's Amended Contention 6.1.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 2nd day of July, 2003