UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS:

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Docket Nos. 50-295 and 50-304

In the Matter of

COMMONWEALTH EDISON COMPANY

(Zion Nuclear Power Station,
Units 1 and 2)

CLI-00-05

MEMORANDUM AND ORDER

I. INTRODUCTION

The Commonwealth Edison Company ("ComEd" or "the licensee") has requested an exemption for both units of the Zion facility from certain requirements in the NRC's regulations involving physical security. Two individuals, Randy D. Robarge and Edwin D. Dienethal (jointly, "petitioners"), have requested that the Commission grant them leave to intervene in the exemption proceeding. For the reasons stated below, we deny the petitioners' request.

II. BACKGROUND

On July 30, 1999, ComEd filed a request for an exemption, pursuant to 10 C.F.R.§ 73.5, from certain regulations that govern physical protection at all nuclear power plants for the Zion Nuclear Power Station, Units 1 and 2 ("Zion Station").[(1)] The Zion Station is a two-unit facility that has been removed from service and is being prepared for decommissioning. On February 13, 1998, ComEd certified that it had permanently ceased operations at Zion, and on March 9, 1998, ComEd certified that all fuel had been removed from the reactor. Thus, in accordance with 10 C.F.R. § 50.82(a)(2), the Zion license no longer authorizes ComEd to load fuel into the reactor vessel or to operate the reactor.

The requested exemption involved in this case would relieve ComEd of the need for compliance with five separate provisions of 10 C.F.R. § 73.55 that pertain to protecting nuclear reactors against sabotage-- specifically, subsections (a), (c)(6), (e)(1), (f)(4), and (h)(3) -- and allow ComEd to implement a revised "defueled physical security plan" that ComEd asserts would be more appropriate for a permanently shut down and defueled facility. After review of the exemption request, the NRC Staff prepared and published an "Environmental Assessment and Finding of No Significant Impact," 64 Fed. Reg. 53423 (Oct. 1, 1999). On October 18, 1999, the NRC Staff issued the requested exemption based on its findings under 10 C.F.R. § 73.5 that the exemption is authorized by law and will not endanger life or property or the common defense and security and is otherwise in the public interest. See 64 Fed. Reg. 57155 (Oct. 22, 1999)[(2)]

On October 27, 1999, the petitioners filed a joint letter, pro se, asking "for leave to intervene in [ComEd's] application to amend its Facility Operating License [sic]. . . ." Letter of October 27, 1999 ("the petition"), at 1. On November 12, 1999, ComEd filed a letter with the Commission requesting an extension of time in which to respond to the petition.

On November 16, 1999, the Commission issued an Order which (1) granted ComEd's request for an extension of time in which to respond, (2) established a schedule for responses by both ComEd and the NRC Staff, and (3) provided the petitioners with an opportunity to file a reply to the ComEd and Staff responses. The Order also noted the failure of both the petitioners and ComEd to comply with NRC regulations regarding service of pleadings and admonished all participants to comply with these regulations in the future. See Order of November 16, 1999.

The NRC Staff filed an immediate response, noting that contrary to petitioners' assertions, ComEd had filed a request for an exemption, not a request for a license amendment. Staff then argued that section 189a. of the Atomic Energy Act does not provide a right to a hearing on an exemption request. It further asserted that petitioners had failed to demonstrate their standing to intervene. On November 29, 1999, one week after its response was due, ComEd filed a letter stating that "[t]he NRC Staff's Response sets forth an adequate basis for the Commission to decide that the [petition] . . . should be denied."

Letter of November 29, 1999 ("ComEd Response") at 1.[3] The petitioners did not file a reply to the NRC Staff's response.

III. PETITIONERS' RIGHT TO INTERVENE

A. Hearing on Exemptions

Although petitioners characterize the proceeding in which they seek to intervene as one for an "amendment" to the Zion license, the proceeding identified in the petition is one for consideration of an exemption from the NRC's regulatory requirements in 10 C.F.R. Part 73. Thus, the question at the outset is whether the Atomic Energy Act ("AEA") of 1954, as amended, provides a right to a hearing on a request for an exemption from an NRC regulation.

Section 189 of the AEA provides, in pertinent part, that:

> In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, . . . the Commission shall grant a hearing upon the request of any party whose interest may be affected by the proceeding and admit that person as a party to the proceeding.

42 U.S.C. § 2239(a)(1)(A).

The Commission has previously considered this provision in connection with a request for a hearing on an exemption. In 1982, the U.S. Department of Energy ("DOE"), the applicant for a construction permit for the Clinch River Breeder Reactor ("CRBR"), sought an exemption under the authority of 10 C.F.R. § 50.12(b) from the restrictions of 10 C.F.R. § 50.10(c) to allow preliminary site work prior to issuance of the construction permit. Although we had previously denied a similar request, we took the matter under advisement and after an "informal" hearing granted the requested exemption. See generally United States Department of Energy (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412 ("Clinch River").

The intervenors in that proceeding, the Natural Resources Defense Council, Inc., and the Sierra Club, argued that the AEA required a formal adjudicatory hearing regarding the DOE exemption request. The Commission rejected that argument. We found that Section 189a. of the AEA deliberately limited hearing rights to those particular types of administrative actions that were listed in that section, and we concluded that granting the exemption in question in the Clinch River case was not one of those actions. Id. The legislative history of Section 189a. supports our interpretation.

When the draft of the AEA was reported out of the Joint Committee on Atomic Energy in June of 1954, it contained two provisions that are relevant to this analysis: Section 181 and Section 189, which were both contained in Chapter 16, entitled "Judicial Review and Administrative Procedure." Section 181 of the draft Act, entitled "General," was the first section of Chapter 16, and contained language that applied the Administrative Procedure Act ("APA") to the Commission's actions and required "regular administrative procedures" to be followed in both public and non-public proceedings, depending on the sensitivity of national security interests. See S. Rep. No. 83-1699 at 82 (June 30, 1954). The section closed with a sentence that read "[u]pon application, the Commission shall grant a hearing to any party materially interested in any 'agency action.'" Id.

Meanwhile, Section 189, the last section in Chapter 16 and entitled "Judicial Review," provided:

> Any final order granting, denying, suspending, revoking, modifying, or rescinding any license or construction permit, or application to transfer control, or any final order issuing or modifying rules and regulations dealing with the activities of licensees entered in an 'agency action' of the Commission shall be subject to judicial review in the manner prescribed in the Act of December 29, 1950, as amended (ch. 1189, 64 Stat. 1129), and to the scope of judicial review and other remedies provided by section 10 of the Administrative Procedure Act.

Id. at 85. Thus, as introduced in late June of 1954, the draft AEA's provision for intervention was separate from the provision for judicial review. While the intervention provision would have granted a hearing to parties affected by any action, the judicial review provision was limited to specifically identified actions.

The current wording of the first sentence of section 189a. was introduced as part of an amendment offered by Senator Hickenlooper of Iowa. The amendment was debated and passed on July 16, 1954. See generally 100 Cong. Rec. 10170-71 (July 16, 1954).[4] The Hickenlooper amendment created a new Section 189 which provided:

> a. In any proceedings under this act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceedings for the issuance of [sic] modification of rules or regulations dealing with the activities of licensees, and in any proceeding brought under the provisions of section 153, and in any proceeding for the payment of compensation, an award or royalties under section 156, 186(c) or 188, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding and shall admit any such person as a party to such proceeding.
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> b. Any final order entered in any proceeding of the kind specified in subsection a. above entered in an "agency action" of the Commission shall be subject to judicial review in the manner prescribed in the act of December 20, 1950, as amended (ch. 1189, 64 Stat. 1129), and to the provisions of section 10 of the Administrative Procedure

Act.

100 Cong. Rec. 10170. Thus, the amendment combined the hearing requirement from the last sentence of the original Section 181 with the original Section 189 that had specified judicial review for only the particular items identified therein. As Senator Hickenlooper explained,

> this section reincorporates the provisions for hearings formerly made in section 181 but clearly specifies the types of Commission activities in which a hearing is to be required. The purpose of this revision is to specify clearly the circumstances in which hearings are to be held.

100 Cong. Rec. at 10171.[(5)] The amendment was passed without opposition, id., and Section 189 in the final version of the AEA contained this wording basically intact.[(6)]

The upshot of this history is that Congress intentionally limited the opportunity for a hearing to certain designated agency actions -- agency actions that do not include exemptions. Thus, we continue to regard our previous analysis of the question whether a person is entitled to a hearing regarding a request for an exemption from NRC regulations as valid. As Senator Hickenlooper pointed out, the statute "clearly specifies the type of circumstance in which hearings are to be held." Id. Unless the exemption in question here can be properly characterized as one of these "circumstances", petitioners have no right to a hearing.

Petitioners in this case sought leave to intervene "in [Com Ed's] application to amend its Facility Operating License." It has been argued on other occasions -- and perhaps implicitly by petitioners here -- that by granting an exemption the NRC is somehow "amending" the license involved in the agency action. Thus, we must address whether the requested Zion exemption, regardless of its label, somehow constitutes an action for which a hearing is required, i.e. whether the exemption is in effect an amendment of the facility license or modification of the rules and regulations dealing with the activities of licensees. As we demonstrate below, the Zion exemption is plainly a pure "exemption" of the kind contemplated in our rule, and cannot be viewed as a license amendment or a rule modification.

The issue was raised in Commonwealth of Massachusetts v. NRC, 878 F.2d 1516 (1st Cir. 1989). In that case, the United States Court of Appeals for the First Circuit found that the NRC's grant of an exemption did not constitute a license amendment. In 1989, the NRC granted Boston Edison an exemption from the requirement in 10 C.F.R. Part 50, App. E, to conduct a biennial full-participation emergency preparedness exercise at the Pilgrim facility, and did not offer a hearing. See 54 Fed. Reg. 336, 338 (Jan. 5, 1989). The Commonwealth of Massachusetts challenged the exemption, arguing that it constituted an amendment to the Pilgrim license and that the AEA required the NRC to hold a prior hearing. 878 F.2d at 1519.

The Court of Appeals rejected the Commonwealth's argument. The Court noted that although the Boston Edison license required Boston Edison to operate in accordance with NRC regulations, the exemption was granted pursuant to another NRC regulation, 10 C.F.R. § 50.12, also in Part 50, the source of the requirement from which Pilgrim was being exempted. Thus, the Court noted,

> [t]he same regulation which imposes the emergency drill requirement ... allows for exemptions to it. The exemption did not change Edison's duty to follow NRC rules; it only changed which rule applied for a brief period of time. Edison was thus operating in accordance with its unaltered license.

878 F.2d at 1521.[(7)] In essence, the Court ruled that the exemption provision, § 50.12, was an integral provision of the regulations which were made generally applicable by the license. Thus, the exemption the NRC had granted from the exercise requirement was authorized by a regulation specifically applicable to that requirement, and therefore the Commission had neither modified its regulations nor amended Boston Edison's obligation under its license "to operate in accordance with NRC regulations[.]" Id.

The same is true here. ComEd has filed an application under 10 C.F.R. § 73.5 (a provision specifically providing for exemptions, analogous to 10 C.F.R. § 50.12 in the Commonwealth of Massachusetts case) for an exemption from a set of requirements imposed by 10 C.F.R. § 73.55. See Letter of July 30, 1999, note 1, supra, and Attachment 2 to that letter. Both regulations are referred to in the Zion license. Thus, as in Commonwealth of Massachusetts, the grant of this exemption does not change or amend the Zion license or modify the Commission's regulations, and accordingly a hearing is not required in this case.[(8)] See also Kelley v. Selin, 42 F.3d 1501, 1517 (6th Cir. 1995) ("[T]he grant of an exemption from a generic requirement does not constitute an amendment to the reactor's license that would trigger hearing rights.").

In short, there is no right to request a hearing in this case because the action involves an exemption from NRC regulations and not one of those actions for which section 189a. of the AEA provides a right to request a hearing.

B. Standing

If the AEA provided for hearings on exemption requests, which it does not, we would have to consider the petitioners' standing. As discussed below, we conclude that the petitioners lack the requisite standing to intervene even if this were a case in which petitioners had a right to request a hearing.

Section 189a. of the AEA provides that "any person whose interest may be affected by the proceeding" must be granted a hearing. 42 U.S.C. § 2239(a). Pursuant to NRC regulations, a petition for intervention must "set forth with particularity the

interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, . . . and the specific aspect or aspects of the subject matter of the proceeding as to which [the] petitioner wishes to intervene." 10 C.F.R. § 2.714(a)(2). See generally Envirocare of Utah v. NRC, 194 F.3d 72 (D.C. Cir. 1999). "Accordingly, a petitioner seeking to intervene in a license amendment proceeding must assert an injury-in-fact associated with the challenged license amendment, not simply a general objection to the facility." Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 and 2), CLI-99-04, 49 NRC 185, 188 (1999) (emphasis in original), petition for review denied sub nom. Dienethal v. NRC, No. 99-1132 (D.C. Cir. Jan. 21, 2000).

In their petition, petitioners allege simply that they reside within 50 miles of the Zion Plant, that operations at the plant impact their health, safety, and financial interests, and that an order will impact these interests. Petition at 1-2. In addition, they allege that they have "direct information concerning the threat to health and safety posed by Zion Nuclear Station." Id. at 1. These broad and conclusory statements are insufficient to establish standing.

The petitioners fail to even mention, much less demonstrate, how they might be harmed from granting of the exemption at issue here. In fact, nowhere in the petition do the petitioners even discuss the exemption. Thus, the petitioners cannot be said to have "set forth with particularity" how their interests could be affected as our rules require. See 10 C.F.R. § 2.714(a)(2). The petitioners bear the burden to allege facts sufficient to establish standing. It is "incumbent upon . . . [petitioners] to provide . . . some 'plausible chain of causation,' some scenario suggesting how" they might be harmed by the granting of this exemption. Zion,

49 NRC at 192. The petition is devoid of this link to the exemption request. We note that one of the petitioners, Mr. Dienethal, recently requested a hearing in another NRC licensing proceeding, and thus, he should have been fully aware of the Commission's requirements to demonstrate standing when requesting a hearing. Petitioners have failed to show standing and for this additional reason, Petitioners' request for hearing is denied. Zion, 49 NRC at 185.

IV. CONCLUSION

For the reasons given above we find that the petitioners do not have a right to a hearing under Section 189a. of the Atomic Energy Act. Accordingly, their request for a hearing is denied.

IT IS SO ORDERED.

For the Commission

[Original signed by]

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ANNETTE VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland
this 30th day of March, 2000.

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1. Letter from R. M. Rich, Vice President -- Regulatory Services, Commonwealth Edison, to U.S. Nuclear Regulatory Commission, Document Control Desk (July 30, 1999).

2. The Commission determined "that the proposed alternative measures for protection against radiological sabotage meet the same assurance objective and the general performance requirements of 10 CFR 73.55 considering the permanently shutdown conditions at the ZNPS with all of the fuel in the spent fuel pool" Id.

3. The licensee, having requested an extension of time and thereby initiating a process that resulted in the issuance of the November 16th Order, not only failed to file a timely response after seeking and obtaining the right to do so, but also failed to inform the Commission of its decision not to file a reply until a week after the response was due and then only after the Office of the Secretary inquired if a response would be forthcoming. Furthermore, the "letter" that ComEd subsequently filed did not contain any explanation for its lack of timeliness. The Commission again emphasizes that participants in NRC proceedings are expected to comply with NRC Orders, as well as its procedural regulations set forth in 10 C.F.R. Part 2.

4. On the same day, the Senate passed a separate Hickenlooper amendment repealing the language in Section 181 quoted above.

5. The Clinch River decision, supra, mistakenly cites the debate as 100 Cong. Rec. 10181. See 16 NRC at 421.

6. The final version of the 1954 AEA contained only minor changes in Section 189. The wording of the first sentence of section 189a. remains the same today.

7. The exemption at issue was granted under the terms of 10 CFR §50.12(a)(2)(5), which relates specifically to the special circumstance of "temporary relief." Id. The same general exemption authority, 10 CFR § 50.12(a)(2), permits the granting of an exemption in five other special circumstances that are not focused on "temporary relief."

8. As noted above, the First Circuit found that the exemption "only changed which rule applied for a brief period of time." Commonwealth of Massachusetts, 878 F.2d at 1521. Although the exemption here is "permanent" for all practical purposes (for the Zion Station in its permanently shutdown and defueled condition), that difference does not require a different analysis on our part. Both the provision authorizing the exemption and the regulation from which the exemption has been granted are part of the same regulatory scheme governing physical security (10 C.F.R. Part 73), referred to in the facility license and which Com Ed continues to have a duty to follow. Thus the license and the regulations anticipate exemptions-which may be granted without amending the license or modifying the regulations.