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USNRC

UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

'98 FEB 17 P 3:43

OFFICE OF GENERAL COUNSEL
RULE MAKING AND
ADJUDICATION STAFF

Private Fuel Storage, a Limited
Liability Company;

(Independent Spent Fuel Storage
Installation).

Docket No. 72-22 ISFSI
ASLBP No. 97-732-02
ISFSI

February 12, 1998

OGD'S RESPONSE TO WILSON/ALF AMENDED PETITION AND ORDER DATED
2/2/98 ALLOWING PARTICIPANT RESPONSES TO SAID PETITION

Pursuant to the order of the Licensing Board dated February 2, 1998 petitioner Ohngo Gaudadeh Devia (OGD), by and through their counsel, Jean Belille, 2260 Baseline Road, Suite 200, Boulder CO 80302, responds to the Amended Petition of Richard Wilson (Wilson), Scientists for Secure Waste Storage (SSWS) and the Atlantic Legal Foundation (ALF) which was filed on February 2, 1998. For the reasons set forth below, the Petition to Intervene filed by Wilson, SSWS and ALF should be denied.

BACKGROUND

Notice of a proposed 10 CFR Part 72 licensing action by the Nuclear Regulatory Commission (NRC), was published in the Federal Register on July 31, 1997, and afforded interested parties the opportunity to request a hearing and to file a petition to intervene. 62 Fed Reg 41,099 (1997); 10 CFR §2.105. The notice provided, as does the regulations, that, "within thirty (30) days from the date of publication of the notice in the Federal Register, ... Any person whose interest may be affected by the proceeding may file a request for a hearing or a petition for leave to intervene." The applicable

regulation, 10 CFR 2.105 (e) (2) specifies that only "if a request for a hearing or a petition for leave to intervene is **filed within the time prescribed in the notice**, (will) the presiding officer...rule on the request and/or petition...and issue a notice of hearing or an appropriate order." Thirty (30) days from the date of publication in this instance is September 15, 1997. Petitioner's late filed petition for leave to intervene was filed on February 2, 1998 more than five (5) months late.

DISCUSSION

A. NRC LACKS REGULATORY AUTHORITY TO ENTERTAIN LATE FILED PETITION TO INTERVENE

OGD asserts that the presiding officer in this situation does not have regulatory authority to even entertain the late filed petition to intervene.

The applicable regulation, 10 CFR 2.105 (e) (2) specifies that only "if a request for a hearing or a petition for leave to intervene is **filed within the time prescribed in the notice**, (will) the presiding officer...rule on the request and/or petition...and issue a notice of hearing or an appropriate order." (Emphasis Added).

B. STANDARDS FOR INTERVENTION BY PROPONENTS

There are two means by which a prospective intervenor may be granted the right to intervene in a Nuclear Regulatory Commission (NRC) licensing application proceeding: (A) Intervention as matter of right; and (B) Intervention as a matter of discretion. Both of these will be discussed below.

1. Intervention as a matter of right

Standing to intervene in an NRC licensing application proceeding does not depend

on whether the "litigating posture of the petitioner" is in support of or in opposition to the position of the license applicant. See, In the Matter of Nuclear Engineering Co., Inc., 7 NRC 737, 743 (1978) [hereinafter Nuclear Engineering]. Intervention in NRC licensing proceedings is governed by 10 CFR §2.714, which establishes a "test of standing." See, 51 FR 27,158, 27,160 (1986). In order to intervene as a matter of right, a petition to intervene must satisfy the traditional judicial elements of standing; (1) the Article III constitutional requirement of injury in fact, and (2) the prudential requirement of being arguably within the zone of interests which the statute is designed to protect or regulate. See, Nuclear Engineering, 7 NRC at 740; see also, Portland General Electric Co., et al. (Pebble Springs Nuclear Plant, Units 1 and 2), 4 NRC 610, 613 (1976) [hereinafter Pebble Springs].

Generally, "when a petitioner can show that it possesses a substantial interest in the outcome of the proceedings it has a right to intervene." Office of Communication of United Church of Christ v. Federal Communications Commission, 359 F.2d 994, 1006 (DC Cir. 1966). For example, a party can demonstrate standing "by a showing of its right under the Atomic Energy Act to be made a party, the nature and extent of its property, financial, or other interest in the proceedings, and the possible effect of any order which may be entered in the proceeding on its interest." 51 FR at 27,160. However, "a mere academic interest in a matter, without any real impact on the person asserting it," is insufficient to satisfy injury in fact for purposes of standing to intervene. Pebble Springs, 4 NRC at 613. Petitioners make it clear that "none of the petitioners have personal financial or property interests in the proceeding." Their interest is based solely on an assertion of "a desire to ensure that the public good be properly

considered." OGD asserts that this interest is clearly not enough basis to give the petitioners standing of right to intervene.

2. Intervention as a Matter of Discretion

The NRC possesses broad discretion to grant intervention to a petitioner, notwithstanding the requirements of intervention as a matter of right to confer party status. Factors weighing in favor of discretionary intervention are: (1) the extent to which petitioner's contribution will assist in developing a sound record; (2) the nature of petitioner's interest in the proceeding (e.g., property, financial, or other **significant interest**); (emphasis added), and (3) the possible adverse effect of any order on petitioner's interest(s). Pebble Springs, 4 NRC at 616. The test for discretionary intervention seems to rest on petitioners interest. Again in this situation it seems that petitioners interest is so tenuous as to not even meet the factors considered in discretionary intervention. Further, the factors weighing against the grant of discretionary intervention are: (1) the availability of other means to vindicate petitioner's interest; (2) the extent to which petitioner's interest will be adequately represented by existing parties; and (3) the extent to which petitioner's intervention will cause undue broadening of the issues or otherwise significantly delay the proceeding. Id. Petitioner has not made a showing that other interested intervenors to this proceeding would not represent petitioner's interests, especially in light of the fact that most of the other petitioner's to intervene have specific local interests that will be significantly effected by this proposed action. Further, because of the specific interests represented by the all of the other proposed intervenors it is fairly clear that "the public good (will) be properly considered."

There is also a good possibility that the proposed petitioners will significantly broaden

the issues primarily because of the fact that steps have already been taken by all proposed intervenors to identify specific issue through the pre-hearing conference procedures already held.

C. UNTIMELY INTERVENTION

The NRC may exercise its discretion to grant a late-filed petition to intervene where it is satisfied that the five-factored balancing test of 10 CFR §2.714(a) has been sustained by the petitioner in favor of intervention. See Citizens for Fair Utility Regulation v. United State Nuclear Regulatory Commission, 898 F.2d 51, 54 (5th Cir. 1900) [hereinafter Citizens]. Petitioner bears the burden of demonstrating that a balancing of these factors militates in favor of the NRC granting the tardy petition to intervene. See id. It is irrelevant, for purposes of this determination, "whether the petitioner favors, or instead, opposes the licensing of the facility in question." In the Matter of Long Island Lighting Co., (Shoreham Nuclear Power Station, Unit 1), 18 NRC 387, 396 (1983) [hereinafter Long Island],(noting that the "five section 2.714 (a) factors are to be applied in the same manner in the evaluation of all tardy petitions") [hereinafter Long Island].

Where petitioner cannot demonstrate the first element of "good cause" for failure to file on time, it must "make a compelling showing of the remaining four factors before intervention is proper." Id. (Emphasis added). While it has been noted that "recent event may be a key factor" bearing upon good cause for late intervention, however, a petitioner is not relieved of the duty to address the other four factors. See In the Matter of Metropolitan Edison Co., et al. (Three mile Island Nuclear Station, Unit No. 1), 18 NRC 327, 331 (1983). These other four factors are, in turn, dependent upon whether petitioner

has a "cognizable interest in the proceeding" sufficient to justify untimely intervention. Id. For instance, generalized assertions of interest in "(a) regulatory matters, (b) the administrative process, and (c) the development of economical energy resources" are insufficient to satisfy the concrete, "particularized interest necessary for participation." Id. That is, a mere "generalized grievance" does not satisfy the need to "particularize a specific injury" which will result from the "outcome of the proceeding" in order to possess standing to intervene in the administrative process. Id. at 332-33.

It has been held that good cause is not demonstrated by the failure of the license applicant or other proponent of the licensee to adequately represent those of the petitioner wishing to intervene in the licensing process. See *Citizens*, 898 F.2d at 55 ("NRC precedent consistently and clearly indicates that a potential intervenor cannot rely on another intervenor to present a certain view or represent certain interests without assuming the risk that the intervenor will not do so"). At the same time, the second and fourth factors- "(ii) [t]he availability of other means whereby the petitioner's interest will be protected" and (iv) [t]he extent to which the petitioner's interest will be represented by existing parties" - may be considered simultaneously and a prospective intervenor in favor of the license applicant may be denied the right to late intervention where petitioners intervention would not "supplement the applicant's presentation...to any significant extent." Long Island, 18 NRC at 399. it is also reasonable to assume that an applicant "will present the strongest possible case" for its position in the licensing proceeding. Id.

Thus, license proponents who wish to intervene face the difficult burden of establishing that they will substantially contribute to the proceeding in a non-duplicative

manner. This bears upon the "third lateness factor"- whether "petitioner's participation might reasonably be expected to assist in developing a sound record." Id. Satisfaction of this element requires that petitioner "set out with as much particularity as possible" the specific issues it wishes to call upon, and the content of the testimony to be expected from these witnesses. Id. This element is of significant weight in the balancing test of section 2.714(a). Where a proponent petitioner fails to show a "capability to supplement significantly the applicant's presentation" and a make a substantial contribution to the administrative record "beyond that to be expected of existing parties[,]," a petition for late intervention may be denied. Id. at 400. Here, again it is to be presumed that the applicant itself "would be more than willing to sponsor any expert testimony" bearing upon the license application. Id. at 401. Thus, a license proponent bears a stiff burden in establishing that it will substantially contribute to the record in terms of expert testimony.

Finally, the fifth factor, "potential for delay [,]" is of "immense importance in the overall balancing process." Id. at 402. Although the granting of late intervenor status dictates that petitioner must "take the proceeding as it finds it[,]," this weighted factor at the same time entitles the existing parties to demand that "lateness of the intervention not work to their detriment." Id. In this case, the technical complexity of prospective petitioner's position is likely to both substantially contribute to the potential for delay in this licensing proceeding and work to the detriment of license opponents like OGD.

CONCLUSION

Considering all of the factors mentioned above it seem unlikely that the prospective late petitioners to intervene will are should be able to meet the various tests that must be met

and therefore OGD asks that their late filed petition be denied.

Dated this 13th day of February, 1998.

Respectfully Submitted,

A handwritten signature in cursive script, reading "Jean Belille". The signature is written in black ink and is positioned above a horizontal line.

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OFFICE OF THE
FILE
ADJUDICATOR
Docket No. 72-22
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ISFSI

December 15, 1997

CERTIFICATE OF SERVICE

I hereby Certify that copies of the foregoing Response to Wilson/ALF Amended Petition, were served on the persons listed below (unless otherwise noted) by facsimile with conforming copies by US mail, first class, postage prepaid, this 13th day of February

1998.

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* Sent by US mail only.

Dated this 13th day of February
1998.


Jean M. Belille