

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
EXELON GENERATION COMPANY, LLC)	Docket No. 52-007
)	
(Early Site Permit for Clinton ESP Site))	
)	

NRC STAFF'S ANSWER TO HEARING REQUEST AND PETITION TO INTERVENE BY THE ENVIRONMENTAL LAW AND POLICY CENTER, BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE, NUCLEAR INFORMATION AND RESOURCE SERVICE, NUCLEAR ENERGY INFORMATION SERVICE, AND PUBLIC CITIZEN

INTRODUCTION

Pursuant to 10 C.F.R. § 2.714(c), the staff of the Nuclear Regulatory Commission (Staff) hereby responds to the "Hearing Request and Petition to Intervene" (Petition) jointly filed on January 12, 2004, by the Environmental Law and Policy Center (ELPC), Blue Ridge Environmental Defense League (BREDL), Nuclear Information and Resource Service (NIRS), Nuclear Energy Information Service (NEIS), and Public Citizen (collectively, Petitioners) in this Early Site Permit (ESP) proceeding. For the reasons set forth below, the Staff does not object to ELPC's, BREDL's, NIRS', or Public Citizen's standing to intervene in this matter. However, Petitioners must still proffer at least one admissible contention pursuant to 10 C.F.R. § 2.714(b). The Staff does object to NEIS' representational standing as discussed below.

BACKGROUND

On September 25, 2003, Exelon Generation Company, L.L.C (Exelon) submitted an application pursuant to 10 C.F.R. §52.15 in which it requested an ESP for property co-located with the existing Clinton Power Station facility near Clinton, Illinois (Clinton ESP site). A Notice of Hearing initiating the proceeding on the application and offering an opportunity to petition for leave

to intervene was published in the *Federal Register* on December 12, 2003. 68 Fed. Reg. 69, 462 (2003). In response to the Notice, ELPC, BREDL, NIRS, NEIS, and Public Citizen filed a petition in which they jointly seek to intervene in the ESP proceeding. As set forth below, the NRC Staff has no objection to ELPC's, BREDL's, NIRS', and Public Citizen's standing.¹ The Staff does object to NEIS' representational standing.

DISCUSSION

A. Legal Requirements for Intervention

Any person who requests a hearing or seeks to intervene in a Commission proceeding must demonstrate that they have standing to do so. See Section 189a.(1) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2239(a) (AEA or Act). In order to establish standing, the "petitioner shall set forth with particularity the interest of the petitioner in the proceeding, [and] 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 [§2.714(d)(1)]." 10 C.F.R. § 2.714(a)(2). In addition, the petitioner must advance a "specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene." *Id.*

The petitioner, whether an individual or an organization, must establish the requisite interest for standing. See *Private Fuel Storage, L.L.C.*, (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323 (1999). In order to establish the requisite interest for standing, the petitioner must demonstrate that the proposed action will cause "injury-in-fact" to the petitioner's interest, and that the injury is arguably within the "zone of interest" protected by the statutes governing the proceeding. See *e.g.*, *Georgia Power Co.* (Vogtle Elec. Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 32 (1993). In Commission proceedings, the injury must fall within

¹In order to be admitted as parties to the proceeding, petitioners must still proffer at least one admissible contention pursuant to 10 C.F.R. § 2.714.

the “zone of interests” sought to be protected by the AEA or the National Environmental Policy Act of 1969 (NEPA). *Quivira Mining Co.* (Ambrosia Lake Facility), CLI-98-11, 48 NRC 1, 6 (1998).

To establish injury-in-fact, the petitioner must establish (a) that petitioner personally has suffered or will suffer a “distinct and palpable” harm that constitutes injury in fact; (b) that the injury can fairly be traced to the challenged action; and (c) that the injury is likely to be redressed by a favorable decision in the proceeding. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998), *citing Steele Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101 (1998); *Dellums v. NRC* 863 F.2d 968, 971 (D.C. Cir. 1988); *Vogtle*, 38 NRC at 32. It must be likely, rather than speculative, that a favorable decision will redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Sequoyah Fuels Corp. & Gen. Atomic* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71-72 (1994).

The injury must be “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.” *Lujan*, 504 U.S. at 560. A petitioner must have a “real stake” in the outcome of the proceeding to establish injury-in-fact for standing; while this stake need not be a “substantial” one, it must be “actual,” “direct” or “genuine.” *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 447-48 (1979), *aff’d* ALAB-549, 9 NRC 644 (1979). An abstract, hypothetical injury is insufficient to establish standing to intervene. *International Uranium Corp.* (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116, 117-18 (1998).

In order for an organization to establish standing, it must either demonstrate standing in its own right or claim standing through one or more individual members who have standing. *Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995). Thus, an organization may meet the injury in fact test either (1) by showing an effect upon its organizational interests, or (2) by showing that at least one of its members would suffer as a result

of the challenged action, sufficient to confer upon it “derivative” or “representational” standing. *South Texas Project*, 9 NRC at 447-448.

Where the organization relies upon the interests of its members to confer standing upon it, the organization must show that at least one member who would possess standing in his individual capacity has authorized the organization to represent him. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 31 (1998). *Georgia Tech*, CLI-95-12, 42 NRC at 115. The alleged injury in fact to the member must fall within the purposes of the organization. *Private Fuel Storage*, 48 NRC at 33-34.

Historically, standing has been granted based on a presumption that a petitioner’s close proximity to the facility at issue is sufficient, without more, to establish the requisite injury-in-fact. *Virginia Electric Power Company* (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979). As the “proximity presumption” evolved, it has been applied in a variety of proceedings in which petitioners have lived in ranging distances from the site. See e.g. *Northern States Power Co.* (Prairie Island Nuclear Generating Station, Units 1 and 2), ALAB-107, 6 AEC 188, 190 (1973) (30-40 miles from the site); *Virginia Electric and Power Company*, 6 AEC at 634 (16 miles from the site); *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421, n.4 (1977) (50 miles from the site, standing denied on other grounds). Other types of licensing actions have also adopted a variation of the “proximity presumption.” See *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325 (1989).² In *St Lucie*, the Commission noted:

It is true that in the past, we have held that living within a specific distance from the plant is enough to confer standing on an individual or group in proceedings for construction permits, operating licenses, or significant amendments thereto... However, those cases involved the construction or operation of the reactor itself,

²While this case addressed an exemption from regulatory requirements, the Commission decision characterized the type of proceeding subject to the “proximity presumption.”

with clear implications for the offsite environment, or major alterations to the facility with a clear potential for offsite consequences.

Id. at 329 (citations omitted). Therefore, in other licensing actions, “absent situations involving such obvious potential for offsite consequences, a petitioner must allege some specific ‘injury in fact...’” *St. Lucie* 30 NRC 329-30. While there arguably are differences between an ESP and a construction permit or operating license, the NRC Staff does not object to Petitioners’ standing based on their members’ proximity to the Clinton ESP site.

B. Petitioners’ Standing to Intervene

Petitioners maintain that they have established representational standing to intervene in this proceeding by demonstrating that several members of their respective organizations have standing to intervene and by identifying aspects within the scope of the proceeding. All five organizations have asserted that their members reside within 50 miles of the Clinton ESP site. In addition, Petitioners claim an injury-in-fact to several of their members who assert that because nuclear reactors are “inherently dangerous,” the construction of one or two new nuclear reactors could jeopardize their health and safety. Petition at 5-6, Affidavit at 1.³ In order to obtain representational standing, an organization must demonstrate, *inter alia*, that its members would otherwise have standing to participate in their own right and that at least one of its members has authorized it to represent the member’s interest. As set forth below, ELPC, BREDL, NIRS, and Public Citizen satisfy the representational standing requirement.

1. ELPC

In the Petition, ELPC has alleged representational standing based on the interests of five members: R. Given Harper, Carolyn Treadway, Abigail Jahiel, Thomas Lutze, and Elizabeth Burns.

³ The assertions contained in all of the Petitioners’ affidavits are identical in substance. Therefore, unless reference to a specific affidavit is warranted, all will be noted in this pleading as “Aff.”

These individuals have provided affidavits in support of ELPC's standing in which they assert that they reside in close proximity -within 50 miles- of the Clinton ESP site and that nuclear facilities in close proximity to their homes "could pose a grave risk to [their] health and safety." Aff. at 1. While the affiants have failed to specify the exact distances they live from the Clinton ESP site, they are residents of Normal, Illinois, with the exception of Ms. Burns who resides in Clinton, Illinois, both of which are within 50 miles of the Clinton ESP site. Based on the above, and in light of the proximity standard set forth in *St. Lucie*, the NRC staff does not challenge the standing of each of ELPC's five members to intervene in his or her own right. In addition, all members have authorized ELPC to represent their interests in the instant proceeding. *Id.* Thus, the NRC staff does not object to ELPC's representational standing to intervene.

2. BREDL

BREDL asserts representational standing to intervene based on the affidavits of four of its members: Regina C. Cassidy, Kenneth J. Urban, Geoff Ower, and Samuel Galewsky⁴. All of the affiants claim standing based on their proximity to the Clinton ESP site and each has authorized BREDL to represent their interests in this matter. Aff. at 1. All affiants claim to reside within 50 miles of the Clinton ESP site. While the affiants have failed to specify the exact distances they live from the Clinton ESP site, Ms. Cassidy and Mr. Urban are residents of Champaign, Illinois. Mr. Ower and Mr. Galewsky reside in Normal and Bloomington, Illinois, respectively, all of which are within 50 miles of the Clinton ESP site. As the staff would not contest the affiants' standing to intervene as individuals, the Staff does not object to BREDL's representational standing.⁵

⁴ Mr. Galewsky has submitted three affidavits each separately authorizing representation by BREDL, NIRS and NEIS. The Petition should be amended in order for Mr. Galewsky to select which one of the aforementioned three organizations he wishes to represent his interests.

⁵Although Mr. Galewsky has authorized two additional organizations to represent his interests, the Staff does not object to BREDL's representational standing because Ms. Cassidy, Mr. Urban, and Mr. Ower have authorized only BREDL to represent their interests.

3. NIRS

NIRS claims to have representational standing to intervene based on the affidavits of two of its members: Ralph Dring and Samuel Galewsky. Both Mr. Dring and Mr. Galewsky are residents of Bloomington, Illinois. While they have failed to specify the exact distances they live from the Clinton ESP site, both reside within 50 miles of the Clinton ESP site, and each has authorized NIRS to represent his interests in this matter. Aff. at 1. Inasmuch as the Staff would not challenge the affiants' standing to intervene as individuals, the Staff does not object to NIRS' representational standing.⁶

4. NEIS

NEIS asserts representational standing to intervene based on the affidavits of two of its members: Samuel Galewsky and Sandra Lindberg⁷. Both Mr. Galewsky and Ms. Lindberg are residents of Bloomington, Illinois. While they have failed to specify the exact distances they live from the Clinton ESP site, they reside within 50 miles of the Clinton ESP site, and each affiant has authorized NEIS to represent his interests in this proceeding. Although the Staff would not contest the affiants' standing to intervene as individuals, the Staff does object to NEIS' representational standing unless either (or both) Mr. Galewsky or Ms. Lindberg selects NEIS as his or her sole representative in this proceeding.

5. Public Citizen

Public Citizen claims to have representational standing to intervene in this proceeding based on the affidavits of three of its members: Phil Huckelberry, Sandra Lindberg, and Michelle

⁶Although Mr. Galewsky has authorized two additional organizations to represent his interests, the Staff does not object to NIRS' representational standing because Mr. Dring has authorized only NIRS to represent his interests.

⁷ Ms. Lindberg has submitted two affidavits each separately authorizing representation by NEIS and Public Citizen. The Petition should be amended in order to allow Ms. Lindberg to select which of the aforementioned two organizations she wishes to represent her interests.

Covi. Mr. Huckelberry and Ms. Covi reside in Normal, Illinois. Ms. Lindberg resides in Bloomington, Illinois. While they have failed to specify the exact distances they live from the Clinton ESP site, both Bloomington and Normal are within 50 miles of the Clinton ESP site and each has authorized Public Citizen to represent his or her interests in this matter. Inasmuch as the Staff would not contest the affiants' standing to intervene as individuals, the Staff does not object to Public Citizen's representational standing.⁸

C. Petitioners' Aspects

Pursuant to 10 C.F.R. § 2.714(a)(2), a petitioner is required to state the "specific aspect or aspects of the subject matter of the proceeding" as to which it wished to intervene. The purpose of this requirement is not to judge the admissibility of the issues, but to determine whether the Petitioners specified "proper aspects" for the proceeding. *Consumers Power Co.* (Midland Plant, Units 1 and 2), LBP-78-27, 8 NRC 275, 277-78 (1978). To constitute an appropriate aspect, the subject matter of the aspects must be within the scope of the application or the proceeding. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-91-39, 34 NRC 273, 282 (1991); *Florida Power & Light Company* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 151 (2001); *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Units 2 and 3), LBP-01-10, 53 NRC 273, 280 (2001); *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 206 (1993).

Petitioners proffer three aspects of the subject matter of the ESP application that they wish to challenge. Petition at 5-6. Petitioners' Aspect 1 is within the scope of the ESP application:

1. Whether Exelon's Environmental Report and the NRC have failed to provide a rigorous exploration and objective evaluation of all reasonable renewable energy resource and energy efficiency alternatives, and "clean coal" alternatives, to the

⁸Although Ms. Lindberg has authorized another organization to represent her interests, the Staff does not object to Public Citizen's representational standing because Mr. Huckelberry and Ms. Covi have authorized only Public Citizen to represent their interests.

granting of the requested Early Site Permit for the proposed Clinton 2 nuclear plant, as required by the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*

Petition at 5. Consequently, the NRC Staff does not object to Petitioner's Aspect 1.

CONCLUSION

For the reasons set forth above, the Staff concludes that ELPC, BREDL, NIRS, and Public Citizen have established standing to jointly intervene in this proceeding, and have identified an aspect of the subject matter of the proceeding in which they wish to intervene. Leave to intervene, however, should not be granted unless the Petitioners submit at least one valid contention, pursuant to 10 C.F.R. § 2.714(b). The Staff does object to NEIS' representational standing unless either (or both) Mr. Galewsky or Ms. Lindberg selects NEIS as his or her sole representative in this proceeding.

Respectfully submitted,

/RA/

Mauri T. Lemoncelli
Counsel for NRC Staff

Dated at Rockville, Maryland
this 29th day of January, 2004

January 29, 2004

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NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.713(b), the following information is provided:

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Respectfully submitted,

/RA/
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Dated at Rockville, Maryland
this 29th day of January, 2004

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO HEARING REQUEST AND PETITION TO INTERVENE BY THE ENVIRONMENTAL LAW AND POLICY CENTER, BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE, NUCLEAR INFORMATION AND RESOURCE SERVICE, NUCLEAR ENERGY INFORMATION SERVICE, AND PUBLIC CITIZEN" and the "NOTICE OF APPEARANCE" of Mauri T. Lemoncelli in the above captioned proceeding have been served on the following through deposit in the NRC's internal mail system, with courtesy copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service, as indicated by double asterisk, with courtesy copies by electronic mail this 29th day of January, 2004.

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