



21/12/81

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

2/12/81

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

CONSOLIDATED EDISON COMPANY
OF NEW YORK

(Indian Point Station,
Unit No. 2)

Docket No. 50-247
(Spent Fuel Pool Modification)

NRC STAFF RESPONSE TO
NEW YORK PUBLIC INTEREST RESEARCH GROUP
LATE REQUEST FOR A HEARING

The Staff of the Nuclear Regulatory Commission (Staff) hereby opposes the late request for a hearing filed by the New York Public Interest Research Group (NYPIRG) on January 19, 1981, on the ground that the request does not comply with the requirements of 10 C.F.R. § 2.714 of the Commission's regulations.

I. BACKGROUND

On September 7, 1979, Consolidated Edison Company of New York, Inc. (Licensee) filed an application with the NRC to amend Facility Operating License No. DPR-26 for the Indian Point Nuclear Generating Plant Unit No. 2. This application was supplemented on May 6, 1980. The requested amendment would allow an increase in the spent fuel storage capacity of the spent fuel pool at Indian Point Unit 2.

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On May 28, 1980, a Notice of Proposed Issuance of Amendment to Facility Operating License was published in the Federal Register regarding Licensee's application. 45 Fed. Reg. 35948. This Notice described the nature of the action to be taken, and set forth the requirements to be met by persons wishing to seek leave to intervene and to request a hearing on the application. Id. at 35949. All petitions for leave to intervene and/or requests for hearing were to be filed by June 27, 1980.

On June 25, 1980, the New York State Energy Office filed a petition for leave to participate as an interested state if a proceeding were to be held. The Energy Office did not, however, request a hearing itself on the amendment application. No other responses to the Federal Register notice were received by June 27, 1980.

On January 19, 1981, some six months after the filing date set forth in the Federal Register notice, NYPIRG filed a document entitled "Late Filing of Request for Hearing." NYPIRG set forth various concerns about the proposed spent fuel pool modification, and requested that these concerns be discussed in a public hearing. The only reason for its request for a hearing is NYPIRG's statement that:

"considering the enormity of the consequences that could occur in connection with any serious accident at Indian Point, and the attention now being focused by the Commission on all matters relating to that site...it would be extremely ill-advised for the Commission to

permit Con Edison further compaction without any public hearings on the matter."

NYPIRG Late Request for Hearing at 2, hereinafter NYPIRG Request.

The Staff concludes that this late request for a hearing should be denied, since it does not meet the requirements of 10 C.F.R. § 2.714 either in respect to the establishment of an interest which might be adversely affected by the proposed action, or with respect to the factors to be considered in a decision whether to grant an untimely petition for leave to intervene.

II. ARGUMENT

A. Petitioner has failed to establish an interest which would be adversely affected by the proposed action as required by 10 C.F.R. § 2.714(a)(2).

According to 10 C.F.R. § 2.714(a)(2) of the Commission's regulations, petitions for leave to intervene 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, including the reasons why petitioner should be permitted to intervene, with particular reference to factors in paragraph (d) of this section, and the specific aspect or aspects of the subject matter of the proceeding as to which petitioner

wishes to intervene. ^{1/} In determining whether a petitioner for leave to intervene in an NRC proceeding has alleged an "interest which may be affected by the proceeding" within the meaning of § 2.714, the Commission has determined that judicial concepts of standing shall apply. Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976). These concepts require a showing that the action being challenged could cause injury in fact to the persons seeking leave to intervene, and that such injury is arguably within the "zone of interest" protected by the statute governing the proceeding. Id. at 613.

^{1/} 10 C.F.R. § 2.714(d) states:

- (d) The Commission, the presiding officer or the atomic safety and licensing board designated to rule on petitions to intervene and/or requests for hearing shall, in ruling on a petition for leave to intervene, consider the following factors, among other things:
 - (1) The nature of the petitioner's right under the Act to be made a party to the proceeding.
 - (2) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.
 - (3) The possible effect of any order which may be entered in the proceeding on the petitioner's interest.

Where, as here, the petitioner is an organization, the Appeal Board has previously held that a corporate environmental group has standing to intervene and represent the interests of those members who have an interest which will be affected by the proposed action. Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-322, 3 NRC 328, 330 (1976). However, to establish its standing the organization must specifically identify by name and address at least one member who wishes to be represented by the organization and who has an interest which would be adversely affected by the licensing action being sought. Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 390-393 (1979). A general interest in a given problem is not enough to clothe an organization with standing to intervene in an NRC proceeding. Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420, 422 (1976).

NYPIRG has not attempted to establish an interest adversely affected by this license amendment application. The organization does not point to any member living in the area of the Indian Point plant, nor does the official signing the request claim a personal interest which would be affected by the proposed action. Rather NYPIRG claims that hearings should be instituted "in the public interest." NYPIRG Request at 2. Since no showing by any of the organization's members of a personal interest which would be adversely affected by the proposed action has

been demonstrated, this request for a hearing should be denied as not complying with 10 C.F.R. § 2.714 of the Commission's regulations.

- B. Petitioner has failed to meet the requirements of 10 C.F.R. § 2.714(a)(1) regarding untimely petitions for leave to intervene.

The Commission's regulations state with regard to untimely petitions:

"Nontimely filings will not be entertained absent a determination by the Commission, the presiding officer or the atomic safety and licensing board designated to rule on the petition and/or request, that the petition and/or request should be granted based upon a balancing of of the following factors in addition to those set out in paragraph (d) of this section:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding."

In addressing the first factor, that of establishing good cause for a petitioner's late filing, the appeal board has ruled that where no good excuse is tendered for the tardiness of a petition, the petitioners demonstration on the other factors must be particularly strong. Duke Power Company (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-431, 6 NRC 460, 462 (1977). Failure to read the Federal Register has been held to be an inadequate excuse to justify a nontimely filing. New En-

gland Power & Light Company (NEP, Units 1 and 2), LBP-78-18, 7 NRC 932, 933-34 (1978).

In the situation before this Board, NYPIRG has addressed only very briefly the first and last factors of those set forth in 10 C.F.R. § 2.714(a)(1). No showing has been made by petitioner with regard to the remaining three factors. NYPIRG states that, although they monitor Indian Point operations closely, they "failed to spot" the Federal Register notice in question here. This is not a sufficient excuse under Commission case law for the untimely filing of a petition for leave to intervene. Therefore, this factor should weigh against the grant of this request, and should increase the burden upon NYPIRG to make strong demonstrations with regard to the remaining four factors of § 2.714(a)(1).

NYPIRG makes no mention of the next three factors governing the grant of untimely petitions. Moving to the last factor NYPIRG states "expeditious hearings now should not create any problems since it is our understanding that the staff does not expect to rule on this matter for some time." NYPIRG Request at 2. While this may be true, the Appeal Board has held that § 2.714(a) cannot be read as manifesting a Commission judgment that irrespective of the conclusions reached on the other factors, an untimely petition should always be accepted so long as no broadening of the issues or delay in the progress of the proceeding is involved. Gulf States Util-

ities Company (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 798 (1977). Since NYPIRG has completely neglected three out of the five factors set forth in § 2.714(a)(1), the possibility that intervention at this point by the organization would not delay the proceeding should not weigh heavily in favor of the grant of NYPIRG's request. This untimely request for a hearing should be denied based on NYPIRG's failure to make even a cursory demonstration with regard to a majority of the five factors which must be balanced in determining whether or not to grant an untimely petition for leave to intervene. Leave to intervene as a matter of right should be denied.

C. Discretionary intervention should not be granted to NYPIRG.

The Commission has held that, in some cases, even though a petitioner does not meet the strict judicial standing requirements, intervention should be allowed as a matter of discretion. Pebble Springs, CLI-76-27, supra, at 614. The factors favoring such intervention would be:

- (1) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (2) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.
- (3) The possible effect of any order which may be entered in the proceeding on the petitioner's interest.

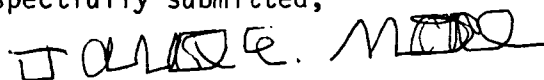
Id. at 616.

The most important of these factors should be the one concerning the petitioner's ability to make a valuable contribution to a sound record. Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-397, 5 NRC 1143 (1977). The burden of convincing the Board of petitioner's capability in this area should lie with that petitioner. Nuclear Engineering Company, Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743-44 (1978). Petitioners have made no attempt to meet this burden. As mentioned above petitioner has no property or financial interest which would be adversely affected by the proposed action. Without the grant of this petition, there would be no proceeding on this license amendment application. In such a case, where a hearing is not commanded by the Atomic Energy Act or the Commission's regulations, discretionary intervention should not be allowed unless there is a particularly strong showing by a petitioner of an ability to make a substantial contribution to the record. See, Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1422 (1977). No such strong showing exists here. Therefore, NYPIRG's request for a hearing should not be granted with regard to this license amendment application as a matter of the Board's discretion.

CONCLUSION

For the reasons set forth above, the Staff concludes that NYPIRG's Late Request for Hearing should be denied.

Respectfully submitted,



Janice E. Moore
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 12th day of February, 1981.

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CERTIFICATE OF SERVICE

I hereby certify that copies of NRC STAFF RESPONSE TO NEW YORK PUBLIC INTEREST RESEARCH GROUP LATE REQUEST FOR A HEARING, 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 through deposit in the Nuclear Regulatory Commission's internal mail system, this 12th day of February, 1981.

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