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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman
Thomas S. Moore
Christine N. Kohl

In the Matter of	)	
CONSUMERS POWER COMPANY	)	Docket No. 50-255 SP
(Palisades Nuclear Power Facility)	)	

Mr. Theodore Sachs and Ms. Laura J. Campbell, Detroit, Michigan, for the appellants, Utility Workers Union of America, AFL-CIO, and the Michigan State Utility Workers Council.

Mr. Judd L. Bacon, Jackson, Michigan, for the licensee, Consumers Power Company.

Mr. Stephen G. Burns for the Nuclear Regulatory Commission staff.

DECISION

March 31, 1982

(ALAB-670)

Opinion of the Board by Mr. Moore (in which Mr. Rosenthal and Ms. Kohl join):

The union serving as collective bargaining agent for the licensed operators at the Palisades Nuclear Power Facility [1/]

1/ Appellants are the Utility Workers Union of America, AFL-CIO, and the Michigan State Utility Workers Council (collectively "union").

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appeals the denial of its hearing petition challenging a "confirmatory order" issued by the NRC's Director of the Office of Inspection and Enforcement. The order restricts overtime for the licensed operators at that Consumers Power Company's plant to a degree greater than the agency's generally applicable limitations on such work. The union asserts that the ordered restriction lacks any factual basis and is unsupported by any reasonable safety considerations; rather, the overtime proscription was adopted by the Director after the licensee proposed it as part of a "make peace" offering following a period of stepped up enforcement actions against the company.[2/] The Licensing Board held that the union lacked standing to challenge the order and that the Commission's referral of the hearing petition precluded the Board from granting discretionary intervention to the union. LBP-81-26, 14 NRC 247, 250-259 (1981). The Board also expressed the view that discretionary intervention for the union would, in any event, be inappropriate. Id. at 259-262.

We reverse. We do not believe that the Commission's referral order barred the grant of discretionary intervention or, in the circumstances presented, that such intervention should have been withheld. In permitting the union to intervene, we heed

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2/ See Reply of Utility Workers Union in Support of Hearing May 28, 1981, at 2.

the Commission's counsel in Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 616 (1976), that "our regulatory responsibilities can best be carried out by allowing intervention as a matter of discretion to some petitioners who do not meet judicial standing tests." We eschew the opportunity to resolve the standing question, however, because we hold considerable doubt that, as presented, this issue is likely to arise again in Commission proceedings. 3/

3/ Although standing questions occasionally surface in NRC adjudications outside the context of construction permit, operating license or license amendment proceedings, such instances are infrequent. Here, the standing issue arises in an enforcement action. Moreover, the question of the union's standing takes a form that makes it most unlikely to recur. In order to meet the "injury in fact" component of the familiar two-pronged standing test applicable to Commission proceedings (see Pebble Springs, supra, 4 NRC at 613-614), the union, as representative of its members, alleges that the confirmatory order caused a garden variety pocketbook injury to the employment opportunities of the Palisades' operators.

But it is the union's "zone of interest" argument that sets this case apart from the standing questions common to Commission proceedings. Rather than assert an interest within the penumbra of the statutes ordinarily administered by the Commission, the union alleges an interest arguably within the zone of interest of the federal labor statutes. In a federal court such an asserted interest seemingly would present no barrier to meeting the zone test. See Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970) per curiam (plaintiff travel agents found within zone of interest of one statute -- the Bank Service Corporation Act -- when, as revealed by underlying opinions (408 F.2d 1147 (1st cir. 1969), vacated, 397 U.S. 315 (1970), on remand, 428 F.2d 359 (1st Cir. 1970), reversed, 400 U.S. 45, supra), they had alleged that actions by a national bank pursuant to a ruling of the Comptroller of the Currency violated National Bank Act's "incidental powers" restrictions). See also Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970). In the setting of

(FOOTNOTE CONTINUED ON NEXT PAGE)

I.

On March 9, 1981 the Director of I&E issued an "Order Confirming Licensee Actions to Upgrade Facility Performance"[4] which, as the title implies, reflects the licensee's prior consent to be bound by the terms of the order. Sections II, III and IV of the order describe its history.

Section II relates that, over the past several years, the NRC has cited the Palisades facility for numerous infractions of agency regulations. Inspections during the period September 1979 to September 1980 disclosed 41 items of non-compliance. The same period produced two enforcement actions. One, pending at the time of the order, involved a proposed civil penalty of $450,000 for a continuing violation of containment integrity. The second entailed a penalty of

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3/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE) an NRC administrative proceeding, however, it raises questions not readily amenable to resolution. Because we doubt the standing question presented by the union petition is likely to recur, we see no present necessity to decide the matter when our opinion would provide little practical guidance for future cases.

4/ 46 Fed. Reg. 17688 (March 19, 1981).

$16,000 for employee errors in misaligning valves for safety-related equipment. As a consequence of licensee's conduct, the NRC graded the facility's performance for reactor operations and radiation protection "below average" among Region III licensees for the 1979-80 period.

Section III of the order recites the licensee's most recent infraction of agency rules: the January 6, 1981 failure of an electrical repairman to follow required procedures. This error caused a one-hour isolation of the 125 volt station batteries in violation of the technical specifications in Consumers' operating license and resulted in an "immediate action letter" to the licensee prescribing short term corrective actions.

The brief operating history recounted in the second and third sections of the order led the Director in section IV to conclude "that major changes in the licensee's management controls are necessary to assure that the licensee can operate the Palisades facility without undue risk to the health and safety of the public."[5/] To meet the agency's concerns, Consumers proposed a program to upgrade performance

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5/ Id.

and assure safe operation at Palisades. Thereafter the licensee made certain additional commitments and, in section V of the challenged order, the Director confirmed all of these undertakings along with the earlier prescriptions contained in the agency's immediate action letter. As relevant here, paragraph B of that section states:

> Extended overtime on the part of licensed operators shall be avoided by restricting the overtime for licensed operators as follows:
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> (1) No more than 4 overtime hours in any 24-hour period;
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> (2) No more than 24 overtime hours in any 7-day period;
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> (3) No more than 64 overtime hours in any 28-day period.
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> The Director of Region III may relax or terminate any of the preceding conditions in writing for good cause. 6/

The final section of the Director's order contains the routine language of a notice of hearing; i.e., any person having an interest affected by the order may request a hearing in accordance with the Commission's regulations. It concludes, however, with the statement that "[i]f a

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6/ Id. at 17689.

hearing is held, the issue to be considered at such hearing shall be: Whether, on the basis of the matters set forth in Sections II and III of this Order, this Order should be sustained."[7/]

In response to the Director's order, the union filed with the Commission a timely petition seeking a hearing to challenge the validity of the confirmatory order's overtime restriction. In its petition, the union states that it is the exclusive bargaining agent for the licensed operators at the Palisades facility. It asserts that the order's overtime limitation on Palisades operators is more restrictive than the Commission's otherwise applicable standards established as interim criteria for shift staffing.[8/] The

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7/ Id. at 17690.

8/ The interim shift staffing criteria are contained in a letter dated July 31, 1980 addressed to all licensees and applicants for licenses from the Director, Division of Licensing, Office of Nuclear Reactor Regulation. They provide that:

(1) An individual shall not be permitted to work more than 12 hours straight (not including shift turnover time).
(2) An individual shall not be permitted to work more than 24 hours in any 48 hour period.
(3) An individual shall not work more than 72 hours in any 7 day period.
(4) An individual shall not work more than 14 consecutive days without having two consecutive days off.

petition therefore states (Pet. at 3) that the "employment opportunities" of its members are "adversely affected." The union seeks to have the overtime restriction set aside, alleging (id. at 2) that the restraint was proposed, not by the Commission, but by the licensee without notice or consultation with the union, and that "no reason was demonstrated or existed or was pertinent . . . to occasion greater restriction on overtime than is otherwise required by the Commission's general standards, or is permitted to the licensee under its collective bargaining obligations to the Union under the National Labor Relations Act."

The NRC staff opposed the union's hearing petition. It claimed that (i) the union is not entitled to a hearing because it lacks standing and (ii) a discretionary hearing would neither be a wise use of agency resources nor concern the health and safety mandate of the NRC.[9/] Rather than rule on the union petition, the Commission referred the matter to the

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9/ The licensee filed no opposition to the union petition. Rather, it informed the Commission that if the petition were granted the company wished to participate as a party in the subsequent hearing. Before us, however, Consumers filed a brief because it interpreted our order establishing a briefing schedule as a direction to file one. The licensee now argues that the union lacks standing to challenge the Director's order but that the Commission erected no bar to the Licensing Board's grant of discretionary intervention. On the question of whether the union should be allowed to intervene, the licensee takes the carefully crafted position that it is a close question which, on balance, disfavors union intervention.

Board below stating that:

> The Commission hereby refers the March 31, 1981 request for a hearing to an Atomic Safety and Licensing Board to be appointed by the Atomic Safety and Licensing Board Panel Chairman to decide whether the Union should be granted a hearing. If the Licensing Board determines that a hearing is required, it should conduct the hearing.10/

II.

The Licensing Board held that the Commission's order referring the hearing petition divested the Board of all discretion to allow the union to intervene. It reasoned that the phrase "should be granted" in the referral order must be read in context with the word "required" in the following sentence so as to limit the Board's authority. This interpretation was appropriate, it said, because "[t]he use of discretionary hearings is rare in general, and unheard of in the context of an NRC enforcement action." 14 NRC at 259. Therefore, the Board concluded that "it is inconceivable to suggest that the Commission, without any clear directive so stating, wanted the Board to consider whether a discretionary hearing should be held . . . ." Id.

10/ Commission order, May 29, 1981 (unpublished).

We cannot accept the Licensing Board's reading of the Commission's referral order or its reasoning in support of that interpretation. Nothing in the pertinent language of the order demonstrates that the Commission intended to restrict the Board's authority exclusively to determining whether the union has standing and thus is entitled to intervene as a matter of right. In our view, the Commission's order says two things: (1) a licensing board is to decide whether the union should be granted a hearing; and (2) if so, the same board should proceed with the hearing.[11/] Accordingly, we find no limitation on the authority of the Licensing Board to grant discretionary intervention to the

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11/ The operative language of the Commission's order states that a board was "to decide whether the Union should be granted a hearing. If the Licensing Board determines that a hearing is required, it should conduct the hearing." We reject the Licensing Board's view that the phrase "should be granted" ineluctably must be read in context with the word "required" in the following sentence. Indeed, to read the referral order in this fashion condones a redundancy. To place all emphasis on the word "required" and read it as a proscription on the Board's authority, in effect, renders superfluous the clause "to decide whether the union should be granted a hearing" in the previous sentence of the order. We think the more reasonable reading is to give equal meaning to all the Commission's words thereby placing all parts of the order on the same footing without any duplication or unwarranted emphasis.

union.[12/]

In addition, we reject the Licensing Board's suggestion that the past dispensation of discretionary intervention to parties in Commission proceedings prejudices the future grant of such intervention. In Pebble Springs, supra, the Commission held that the agency could best fulfill its regulatory responsibilities in licensing proceedings by permitting broader public participation than is mandated by section 189a of the Atomic Energy Act of 1954.[13/] It then provided guidelines for the exercise of board discretion in ruling on intervention requests. 4 NRC at 616. Subsequently, in Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438 (1980), the Commission was confronted with a hearing petition challenging a confirmatory enforcement

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12/ Moreover, at the time it referred the union's petition to the Licensing Board, the Commission had before it the staff's opposition which argued, inter alia, that a hearing should not be ordered as a matter of discretion. See NRC Staff's Response to Utility Workers Union of America's Request for a Hearing, April 20, 1981, at 6-10. In this circumstance, we believe that if the Commission intended to remove the Licensing Board's discretion to allow the union to intervene, it would have done so unmistakably.

13/ 42 U.S.C. §2239(a).

order. It paraphrased its Pebble Springs holding and again stated that "the Commission has broad discretion to provide hearings or permit interventions in cases where these avenues of public participation would not be available as a matter of right." Id. at 442. Although the Commission ultimately denied discretionary intervention in Marble Hill, it nevertheless fully examined the question and extinguished any notion that consideration of discretionary intervention in enforcement actions was inappropriate. Thus, contrary to the view expressed by the Licensing Board, we think the Commission's Marble Hill and Pebble Springs decisions teach that hearing boards are empowered to allow intervention in appropriate licensing and enforcement cases in the absence of a specific and clear withdrawal of authority. Here, as we see it, the Commission's order does not clearly rescind that authority.[14/]

14/ We find singularly unpersuasive the staff's argument (Br. at 25) that the "brevity and routine nature" of the referral order, in conjunction with the general agency policy encouraging licensee consent to enforcement orders, evidences the Commission's intent to divest the Licensing Board of authority to permit discretionary intervention. As discussed above, if any inference properly may be drawn from the brevity and routine nature of the referral order, it is a conclusion opposite to that proffered by the staff. See also note 12, supra.

III.

Having found no limitation on the Licensing Board's authority to grant discretionary intervention, we now must decide whether the union petition presents circumstances warranting such a grant. In its Pebble Springs decision, the Commission suggested that hearing boards balance the following six factors drawn from the Rules of Practice[15/] to determine whether a petitioner should be granted discretionary intervention in an agency proceeding:

(a) Weighing in favor of allowing intervention -

(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.

(b) Weighing against allowing intervention -

(4) The availability of other means whereby petitioner's interest will be protected.

(5) The extent to which petitioner's interest will be represented by existing parties.

(6) The extent to which petitioner's participation will inappropriately broaden or delay the proceeding.

4 NRC at 616.

15/ See 10 CFR §2.714(a) and (d).

Although the Licensing Board labeled its interpretation of the Commission's referral order "dispositive" of the intervention question, it nevertheless proceeded to express the view that the Commission's discretionary intervention criteria militated against union participation. 14 NRC at 259-262. We disagree. In the circumstances, denial of the union's hearing request was an abuse of discretion. A proper application and balancing of the criteria for guiding the exercise of discretion favors union intervention.

We shall address each of the six factors seriatim. Before doing so, however, two additional points deserve emphasis. First, for the purpose of resolving this appeal from the denial of a hearing petition, we accept as true all material allegations of the union petition.[16/] We do this because the propriety of the Licensing Board's ruling must be measured against the record made by the litigants. Here, of course, the record consists primarily of the Director's order and the union's petition. Second, to apply properly each of the Commission's

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16/ Virginia Electric and Power Company (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98, 105 (1976). See Florida Power & Light Company (St. Lucie Nuclear Power Station, Unit No. 2), ALAB-420, 6 NRC 8, 13 (1977). Cf. Gladstone, Realtors v. Bellwood, 441 U.S. 91, 109 (1979); Warth v. Seldin, 422 U.S. 490, 501 (1975).

factors, a clear understanding of the allegations comprising the union challenge to the Director's overtime limitation is crucial. Admittedly, the petition is more conclusory and abbreviated than good pleading would suggest. But its gist is plain. It alleges that the overtime proscription placed on the Palisades operators by the confirmatory order is a greater restriction than the agency's otherwise applicable overtime standard[17/] and that this greater restriction[18/] is

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17/ See note 8, supra.

18/ Although the union petition does not quantify the greater overtime limitation placed on the Palisades operators by the confirmatory order, the Licensing Board correctly calculated the maximum difference in permissible overtime under the confirmatory order and the July 31, 1980 criteria (see note 8, supra) as 64 hours in any 28-day period. 14 NRC at 263. In addition, we note that the overtime restrictions in the July 31, 1980 criteria, unlike the restrictions in the confirmatory order applicable only to Palisades operators, apply to the whole group of plant personnel performing safety-related functions. See Attachment to Reply of Utility Workers Union, May 28, 1981.

The July 31, 1980 overtime criteria were superseded by a new Commission policy announced in NUREG-0737, "Clarification of TMI Action Plan Requirements," at 3-6 (November 1980). Even though the NUREG-0737 policy was published several months before the union filed its request for a hearing, the union petition fails to mention the new policy. In any event, this overtime policy applies to those plant personnel performing safety-related functions and provides:

> (1) An individual should not be permitted to work more than 12 hours straight (not including shift turnover time).

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not supported by the events set forth in the order or by any other reasonable safety justification. Coupled with this assertion is the union's proffered explanation why the Director's overtime restriction lacks a proper foundation: the operator

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18/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

(2) There should be a break of at least 12 hours (which can include shift turnover time) between all work periods.

(3) An individual should not work more than 72 hours in any 7-day period.

(4) An individual should not be required to work more than 14 consecutive days without having 2 consecutive days off.

NUREG-0737 at p. 3-7.

On February 18, 1982 the Commission further liberalized its policy on nuclear power plant staff working hours. 47 Fed. Reg. 7352 (February 18, 1982). The new policy applies to those plant staff performing safety-related functions and provides that:

a. An individual should not be permitted to work more than 16 hours straight (excluding shift turnover time).

b. An individual should not be permitted to work more than 16 hours in any 24-hour period, nor more than 24 hours in any 48-hour period, nor more than 72 hours in any seven day period (all excluding shift turnover time).

c. A break of at least eight hours should be allowed between work periods (including shift turnover time).

d. The use of overtime should be considered on an individual basis and not for the entire staff on a shift.

47 Fed. Reg. at 7353.

overtime limitation was proposed, not by the agency, but by the licensee (without notice or consultation with the union) in order to divert the Commission from further enforcement actions against Consumers' Palisades facility.[19/]

Turning to the first factor for gauging the proper exercise of discretion in ruling on intervention requests -- the extent the petitioner's participation would assist in developing the record -- the Licensing Board found that the union could provide no assistance. Id. at 260. The Board stated (id.):

> the Union has not alleged that Palisades has been made any less safe as a result of the restricting of overtime hours. Thus, any "contribution" the Union would make to the record would be to non-safety related issues. To the extent that the Union's "rights" are not related to safety, it is true -- and irrelevant -- that such rights would not be represented by the NRC because such considerations would be outside the NRC's mandate for protecting the health and safety of the public.

19/ See Union Pet. at 1-2; Reply of Utility Workers Union, May 28, 1981, at 2. Stripped of the union's diplomatic phrasing, it alleges that there is no factual or safety basis for the greater overtime restriction because the Director unwittingly approved the licensee's unfair-labor-practice scheme to limit operator overtime when he accepted Consumers' package of remedies designed to deflect further enforcement actions. Or, stated otherwise, had the Director independently analyzed the greater operator overtime restrictions instead of merely rubber-stamping them as part of a larger package, he would have found no basis or necessity for the limitation.

The principal difficulty with the Licensing Board's reasoning is that it overlooks the focus of the record that would be developed in a hearing. It also ignores the very foundation of the union's challenge to the Director's order. As mandated by the Director, the sole litigable issue in any hearing would be whether, on the basis of the operating history recited in sections II and III of the order, the order should be sustained. 46 Fed. Reg. at 17690. Hence, the only record to be developed necessarily must be keyed to the events recited in the order and to a consideration of whether they support the order's various provisions. This dovetails precisely with the essence of the union's allegation that the facts set forth in the Director's order show neither the need for the restriction nor any causal relationship between overtime and the recited licensee deficiencies. Rather than focus on the single litigable issue and its relationship to the union's challenge, the Licensing Board mistakenly perceived the safety significance of the union's allegations.[20/] In our view, the representative

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20/ In reaching its conclusion, the Board fell prey to the staff's sophistic argument that, because the petition did not allege the overtime restriction made the

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of the licensed operators at Palisades is ideally suited to present evidence and otherwise assist in developing the record on the question of whether operator overtime was a causative factor in the events recited in the Director's order. Consequently, this factor weighs in favor of union intervention.

The Licensing Board apparently weighed the second factor against union intervention as well. Its entire consideration of the nature and extent of the petitioner's property, financial or other interest in the proceeding consisted of a single sentence: "Conceding that the Union's interest is economic . . . this interest is not arguably within the 'zone of interests' protected by the Atomic Energy Act." 14 NRC at 260.

20/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

facility less safe, any possible union contribution to the record would be to nonsafety-related issues falling outside the health and safety mandate of the NRC. Although we thought it obvious, a challenge for lack of basis to a putative safety decision of the agency -- in this case the Director's overtime limitation on the Palisades operators -- is as much within the health and safety mandate of the NRC as a claim that a particular agency decision renders a facility less safe.

The union seeks to protect its members from the potential financial loss resulting from the Director's limitation on the number of overtime hours the licensed operators at Palisades may work. This interest is concededly economic. As such, the union's interest is squarely within one of the types of interest (i.e., financial) that the Commission's second factor lists as deserving favorable consideration when determining the question of discretionary intervention. See p. 13 , supra. Furthermore, the operator's pocketbook injury may well prove to be considerable. See note 18, supra. Accordingly, the Licensing Board should have weighed this factor positively for union participation. Instead, the Board considered it negatively because it erroneously concluded that, in order to fall within the bounds of the second factor, the union's asserted interest must fall within the zone of interest of the Atomic Energy Act. But the zone of interest inquiry is relevant only to the question of standing and whether a petitioner is entitled to intervene as a matter of right. See note 3, supra.[21/] Discretionary intervention, on the

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21/ As is evident from the result in Virginia Electric and Power Company (North Anna Power Station, Units

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other hand, is generally intended to allow participation by those petitioners "who do not meet the tests for intervention as a matter of right." Pebble Springs, supra, 4 NRC at 616.

The third factor -- the possible effect of any order on petitioner's interest -- was also incorrectly weighed by the Board against union intervention. Unlike the normal licensing proceeding where some speculation may be involved in ascertaining the possible effect of future orders on a

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21/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

1 and 2), ALAB-363, 4 NRC 631 (1976), following deferral, ALAB-342, 4 NRC 98 (1976), discretionary intervention is not precluded because a petitioner asserts an economic interest outside the zone of interest of the Atomic Energy Act.

No contrary inference should be drawn, as the staff suggests (Br. at 27-28), from our decision in Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit No. 2), ALAB-470, 7 NRC 473, 475 (1978). Our textual remarks accompanying note 2 of ALAB-470 regarding the zone of interest test and the lower Board's treatment of it were intended to be confined to the question of petitioner's standing. They were not aimed at the issue of discretionary intervention -- a subject we addressed exclusively in note 2 of that opinion. Therefore, ALAB-470 should not be read as an endorsement of the notion espoused by the Licensing Board in Fermi, LBP-78-11, 7 NRC 381, 388 (1978), that economic interests outside the zone of interest of the Atomic Energy Act weigh against discretionary intervention when considering the Commission's second factor.

petitioner's interest, application of the third factor to a confirmatory enforcement order lacks such guesswork. As we have seen, the union seeks to protect the paychecks of its members from what it claims is the Director's baseless limitation on the amount of overtime operators may work. Allegations of such an immediate and substantial injury to the Palisades operators, directly attributable to the Director's overtime restriction, weigh in favor of union intervention. But, in applying this factor, the Licensing Board miscast the union's interests and its challenge to the confirmatory order. It viewed the union challenge as a labor dispute between Consumers and its employees with the Director as a bystander who should not referee the dispute. 14 NRC at 260. Insofar as the NRC is concerned, however, any labor dispute between the union and licensee is secondary to the union's challenge to the Director's overtime restriction. The Director issued the order and it is the Director who will enforce it. Similarly, only the Director can modify the overtime restriction. Thus, far from being a bystander, the Director is the central player in the union challenge to the overtime restriction.

Balanced against the first three factors on the intervention scale are three others -- the availability of other

means to protect the petitioner's interest, the extent the petitioner's interest will be represented by existing parties and the extent the petitioner's participation will inappropriately broaden or delay the proceeding. Because it believed another forum was available to hear any union grievance against Consumers, the Licensing Board found the fourth factor disfavored union intervention. Id. at 261. The Board then judged the fifth factor irrelevant and concluded that the sixth factor weighed against intervention because union participation would inappropriately broaden the proceeding by leading to a hearing that otherwise would not be held. Id. at 262. We disagree with the Board's analysis of these three factors as well.

In considering the fourth factor and concluding that the National Labor Relations Board was the appropriate tribunal to hear the union complaint, the Board perpetuated its mistaken view that the union grievance is against the licensee and that this agency is, in effect, only a bystander. As we previously suggested, the Director's order, not the licensee's action, is the central object of the union challenge. More importantly, only the NRC is suited to adjudge a challenge to the factual support and safety significance of the overtime

restriction. No other agency may go behind the Director's order or has the appropriate expertise to review any alleged safety significance of the overtime restriction. Thus, unless and until the Director's order is modified by the NRC, the union cannot obtain complete relief. In the circumstances, we do not think this factor should be credited against union intervention.

Similarly, the fifth factor does not tip the balance against union participation. Although the Board indicated this factor was irrelevant,[22/] we think it is significant that both existing parties to the challenged order -- the licensee and the NRC staff -- allegedly oppose the interests of the Palisades operators. According to the union's petition, it was the licensee that proposed (without prior consultation with the union) the overtime restriction that the Director subsequently adopted. The union's interest, therefore, will not be represented by the existing parties.

22/ The Licensing Board concluded that the fifth factor was irrelevant because the "interest of the intervenor is not within the 'zone of interests' protected by the Atomic Energy Act." 14 NRC at 262. As we earlier stated (see pp. 20-21, supra), whether a petitioner's asserted interest falls within the zone of interest of the Atomic Energy Act is not germane to determining the appropriateness of discretionary intervention.

Finally, with regard to the sixth factor, the Board noted that union intervention will lead to a hearing that otherwise would not be held since no other petitions challenging the confirmatory order were filed. But, contrary to the Licensing Board's view, we are not persuaded that this fact by itself renders a hearing on the union petition inappropriate. In previous operating license proceedings, we have suggested that "[i]f the petitioner is unequipped to offer anything of importance bearing upon plant operation, it is hard to see what public interest conceivably might be furthered by nonetheless commencing a [discretionary] hearing at his or her behest." Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1422 (1977). The same standard should apply to a petition challenging a confirmatory enforcement order. Here the union meets that test. It seeks to demonstrate that there is neither a safety justification nor a causal relationship between operator overtime and the events relied upon by the Director to support the overtime restriction. Clearly such a union presentation bears directly upon the safe operation of the Palisades plant, even though the union challenge does not conform to the more traditional type of claim that an agency decision falls

short of assuring safe operation of a plant. A different result is not warranted because the union asserts that an agency decision goes too far without an adequate factual foundation or safety justification.

Moreover, the particular circumstances of this case suggest an additional reason for permitting the union to challenge the Director's overtime restriction. The Director's order, on its face, does not appear to demonstrate any causal connection between operator overtime and the events recited in sections II and III of the order that purport to support the overtime restriction. Further, the Director's overtime restriction is applicable only to the Palisades licensed operators. It does not apply to any other plant personnel responsible for performing safety-related functions. Yet the single event recited in section III as partial support for the confirmatory order seemingly relates to an electrical repairman, not a licensed operator. This apparent inconsistency, coupled with the Commission's generally applicable overtime policy that applies to all plant personnel performing safety-related functions (see note 18, supra), raises sufficient questions as to the scope of the Director's

order so as to warrant further inquiry. Permitting the union to intervene should resolve the unexplained aspects of the Director's order.

Accordingly, we think that a proper balancing of the Commission's six factors for guiding the exercise of discretion on intervention requests favors union participation.

The Licensing Board's order of July 31, 1981 is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

The concurring opinion of Mr. Rosenthal follows, p. 28 et seq.

Concurring opinion of Mr. Rosenthal:

For the asserted purpose of furthering the safety of plant operation, the Director of the Office of Inspection and Enforcement has imposed a limitation upon licensed operator overtime at the Palisades facility which is more stringent than the generally applicable one. At bottom, the question here is whether the affected individuals (through their duly recognized collective bargaining agent) should be given the opportunity to be heard on the warrant for the Director's action; i.e., on whether, inter alia, there is, in fact, a safety justification for that action. For me, the mere statement of the question suggests its answer. Surely, there must be some adjudicatory forum available in which these operators can challenge as arbitrary an order of an NRC official, issued in purported fulfillment of the responsibilities vested in him by the Atomic Energy Act, which assertedly cuts against their pecuniary interests both immediately and substantially.[1/] And what outside forum might possibly be better equipped than one within this Commission itself to pass an informed judgment upon the existence of a relationship between the

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1/ Even though formally addressed to the licensee, the focus of the order is, of course, upon the employment activities of the operators and it is they who likely will bear its brunt.

Director's imposed overtime limitations and the safe operation of this nuclear facility?

In the particular circumstances at hand, I have no quarrel with resting our reversal of the order below on discretionary intervention principles without coming to grips with the seemingly more difficult question of standing to intervene as a matter of right. For the end result is the same irrespective of how the union's ticket of admission might read: the operators will have the chance to demonstrate the validity of their claim that (stated broadly) the requisite link between the prescribed overtime limitation and reactor safety is missing.[2/] Whether they will succeed in that endeavor remains, of course, to be seen.

I accordingly join fully in the opinion for the Board. In doing so, however, I am constrained to record my doubt that, had we been compelled to reach it, the standing issue could have been decided against the union simply on the basis that only an economic interest is involved. To be sure, it is now

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2/ I do not understand the union to assert that, even if such a link does exist, the Director nonetheless lacked the power to impose the limitation in the execution of his statutory duty to protect the public health and safety. See Sections 103b. and 161i. of the Atomic Energy Act of 1954, as amended, 42 USC 2133(b) and 2201(i).

settled that threatened economic injury (e.g., the possibility of increased utility bills) does not confer standing under the Atomic Energy Act to intervene in a construction permit or operating license proceeding concerned with other than antitrust issues. Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614 (1976); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 242 (1980). But this is a quite different type of proceeding and there is at least room for question whether it likewise is controlled by the teachings of those cases.3/

3/ Among other things, in sharp contrast to the order which the union seeks an opportunity to attack, the grant of a construction permit or operating license application does not serve affirmatively to impose restrictions upon otherwise lawful activities of any person and the economic impact upon members of the public (e.g., ratepayers) of such licensing action is both incidental and indirect. Although a decision on its operative significance can be left for another day, the very existence of this manifest distinction commends caution in the mechanical transfer of standing principles from one type of proceeding to another.