

8/13/79



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

TOLEDO EDISON COMPANY AND
CLEVELAND ELECTRIC ILLUMINATING
COMPANY

(Davis-Besse Nuclear Power Station,
Unit No. 1)

Docket No. 50-346 (SP)

NRC STAFF RESPONSE TO STATE SENATOR
McCORMACK'S STATEMENT OF INTEREST

Background

Following the events at Three Mile Island, the Nuclear Regulatory Commission, (NRC), issued an Order on May 16, 1979 directing that the Davis-Besse Nuclear Power Station, Unit 1, then in a shutdown condition, should remain shut down until certain remedial actions were satisfactorily completed and confirmed by the Director of the Office of Nuclear Reactor Regulation. The Order also directed that the Toledo Edison Company and the Cleveland Electric Illuminating Company (Licensees) accomplish, as promptly as practicable, certain long-term modifications. On July 6, 1979, the Director of Nuclear Reactor Regulation certified that the actions necessary to resume plant operation had been completed.

The May 16, 1979 Order also directed that the Licensee, or any person whose interest might be affected, could request, within 20 days, a hearing with respect to the Order. Previous to this announcement, in a letter dated May 3, 1979, Ohio State Senator Tim McCormack (Petitioner) had requested "...assistance

1131 178 7910110271

in answering [his] concerns about the Davis-Besse nuclear plant..." and stated his "...belief that the Davis-Besse nuclear powered plant in Northern Ohio should not be fired again by nuclear fuels until the public of Northern Ohio and surrounding areas can be fully assured through public hearings"[of the safety of the plant]"^{1/}.

Subsequently, the Commission issued an Order on July 5, 1979 providing for an Atomic Safety and Licensing Board to determine whether State Senator McCormack met the requisite personal interest test for standing to intervene and listed the issues to be litigated if a hearing were required. In that Order, the Commission agreed with the NRC Staff's position that even though the Senator's request was submitted prior to the issuance of its May 16 Order, the application was still timely made. The Commission stated that even if the Senator's subsequent submission on June 7, 1979 were considered late, "...it would clearly meet the criteria of 10 C.F.R. §2.714 for determining when an untimely filing is to be accepted."

In an Order dated July 6, 1979, an Atomic Safety and Licensing Board (Licensing Board or Board) was established to rule on petitions for leave to intervene and/or requests for hearing and to preside over the proceeding in the event a hearing was ordered. Following a telephone conference call on July 19, 1979,

^{1/} The only other letter received by the Commission was a June 18, 1979 letter from a Mrs. Jean Debeljak who was required by a July 16, 1979 Licensing Board letter to respond with her statement, inter alia, of interest and desires for a hearing. Her letter of July 28, 1979 revealed that she did not wish to intervene and the Licensing Board so ruled in an Order dated August 2, 1979.

it was agreed that State Senator McCormack would promptly submit his statement of interest in the proceeding as authorized by the Commission's July 5, 1979 Order and that the Staff and Licensee may respond to the Petitioner's statement two weeks after it had been served. The instant Staff pleading is in response to the statement of interest submitted by Senator McCormack on July 25, 1979. For the reasons listed below, the Staff believes that the Licensing Board should inquire further on the record to ascertain whether his proximity to the Plant is sufficient to satisfy the injury in fact test and thus to establish standing.

Applicable Law

10 C.F.R. §2.714(a)(2) requires that a Petitioner for leave to intervene set forth his or her interest in the proceeding and how such interest might be affected by the results thereof. In this regard, consideration is to be given to the nature of the Petitioner's right to be made a party, the nature and extent of Petitioner's property, financial or other interest in the proceeding, and the possible effect on such interest of any Order entered in the proceeding. 10 C.F.R. §2.714(d). In addition, the petition must identify the specific aspects of the subject matter of the proceeding on which intervention is sought. 10 C.F.R. §2.714(a)(2).

The Commission and Appeal Board have previously emphasized that judicial concepts of standing are controlling in determining whether a Petitioner has satisfied the foregoing requirements for intervention as of right. Portland General Electric Company (Pebble Springs Nuclear Plant. Units 1 and 2), CLI-76-27, 4 NRC 610, 613-614 (1976); Public Service Company of Oklahoma, et al., (Black Fox Station, Units 1 and 2), ALAB-397, 5 NRC 1143, 1144-1145 (1977)

Specifically, a Petitioner must show "injury in fact" (which has occurred or will probably result from the licensing of the facility) and that his alleged interest is "arguably within the zone of interest" protected by either the Atomic Energy Act or NEPA. Pebble Springs, supra.

Discussion.

In his letters of May 3 and July 25, 1979, Senator McCormack lists three ways in which he believes he satisfied the "injury in fact" requirement. In regard to the first, the status as a customer of the Co-licensees, the Commission has previously ruled that the economic interests of ratepayers in nuclear plants are not within the zone of interest of the Atomic Energy Act and thus do not confer standing. Portland General Electric Company, (Pebble Springs Nuclear Plant), CLI-76-27, 4 NRC 610, 614 (1976).

Likewise, the second asserted interest in the Davis-Besse Plant, that of a legislator, has also been held to be insufficient in and of itself, to give the Senator standing to intervene of right in a Federal proceeding. In this regard, the courts have held that the legislator, to have standing, must have a personal stake in the outcome of the controversy to warrant his invocation

of the Court's jurisdiction. Warth v. Seldin, 422 U.S. 490, 498-99 (1975). For instance, in dismissing a complaint for a U.S. Congressman for lack of standing, the Court of Appeals has stated:

(i)t is not sufficient for . . . any legislator merely to allege this status as a ground for standing. Harrington v. Bush, 553 F.2d 190, 197, 198 n. 32 (D.C. Cir. 1977).

Standing in a legislator has been found, however, when the object of the suit was to vindicate the effectiveness of his vote, a condition which satisfied the requirement of standing described above in that the complaining party has suffered some injury in fact which impaired his ability to function as a legislator. Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974). However, the record in this case is bare of any such showing.

As his third basis for injury in fact, the Senator has alleged that his office is 66 miles from the Plant and that his home, some 11 miles to the east, is within 77 miles of the facility. In this regard, the Appeal Board has recently held that an allegation of close proximity to a proposed facility is deemed enough, standing alone, to satisfy the interest requirements of 10 C.F.R. §2.714. Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (January 26, 1979). Although no specific distance from a nuclear power plant has evolved from Commission decisions to define the outer boundary of the geographic "zone of interest," distances up to 50 miles have been found not to be so great as to preclude a finding of standing based on evidence. See, e.g., Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421, n. 4 (1977). Cf. Virginia Electric & Power Co. (North Anna Power Station, Units 1 and 2), ALAB-146, 6 AEC 631, 633-634 (1973); Northern States Power Co.

(Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 190, 193, reconsid. den., ALAB-110, 7 AEC 247, aff'd. CLI-73-13, 6 AEC 241 (1973).

In regard to proximity to the reactor in question, the Staff notes that if the Petitioner's figure of 66 miles from his office is correct, he would be within an area close enough to grant him standing to intervene of right under the rationale of the North Anna case, supra. However, if the distance is as the Licensee states, some 86 road miles to his office and 97 miles to his home, the distance would probably be too far for intervention on the sole basis of proximity to the Plant.

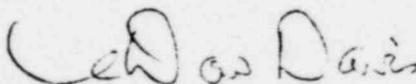
However, since the Senator does indicate that "Often [his] work takes [him] closer to the Plant than the 66-mile range", sufficient doubt exists as to the Senator's proximity to the Plant that a further inquiry on the record is required. Accordingly, the NRC Staff believes that the Licensing Board should call for further submissions as to: (1) the distance from Petitioner's office to the Plant; and (2) the distance, frequency, and nature of the work which takes Petitioner closer to the Plant than his office.

Conclusion

For the reasons listed above, the NRC Staff believes that the Petitioner has not shown standing to intervene in this case of right by reason of being a

ratepayer of the Licensee or as a result solely of his status as a State legislator. The Staff does believe, however, that sufficient doubt does exist on the record as to the actual distance from the Plant to the Petitioner's office and the allegation that he makes other trips even closer to the Plant which would warrant further submissions on these issues.

Respectfully submitted,



L. Dow Davis
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 13th day of August, 1979.

1131 184

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

TOLEDO EDISON COMPANY AND CLEVELAND
ELECTRIC ILLUMINATING COMPANY

(Davis-Besse Nuclear Power Station,
Unit No. 1)

}
}
}
}
}
Docket No. 50-346 (SP)

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO STATE SENATOR McCORMACK'S STATEMENT OF INTEREST" and "NOTICE OF APPEARANCE OF L. DOW DAVIS" dated August 13, 1979 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 13th day of August, 1979.

* Ivan W. Smith, Esq., Chairman
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Cadet H. Hand, Jr.
Director, Bodega Marine Laboratory
University of California
P. O. Box 247
Bodega Bay, California 94923

Dr. Walter H. Jordan
881 W. Outer Drive
Oak Ridge, Tennessee 37830

The Honorable Tim McCormack
Ohio Senate
Statehouse
Columbus, Ohio 43216

Mr. Lowell E. Roe
Vice President
The Toledo Edison Company
Edison Plaza
300 Madison Avenue
Toledo, Ohio 43652

Bruce Churchill, Esq.
Shaw, Pittman, Potts & Trowbridge
1800 M Street, N.W.
Washington, D. C. 20036

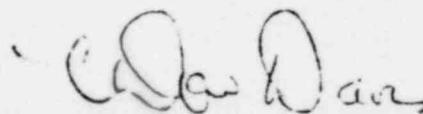
Mr. Donald H. Hauser, Esq.
The Cleveland Electric
Illuminating Company
P. O. Box 5000
Cleveland, Ohio 44101

* Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

* Atomic Safety and Licensing
Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

1131 185

* Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555



L. Dow Davis
Counsel for NRC Staff

1131 18^b