

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

9/4/79

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
METROPOLITAN EDISON COMPANY, et al.) Docket No. 50-289
(Three Mile Island, Unit 1))

NRC STAFF RESPONSE TO PETITIONS
OF THE COMMONWEALTH OF PENNSYLVANIA, THE
PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE,
AND DAUPHIN COUNTY TO PARTICIPATE
PURSUANT TO 10 C.F.R. §2.715(c)



Introduction

The NRC Staff has received copies of petitions from three governmental entities seeking participation in this proceeding pursuant to 10 C.F.R. §2.715(c). A §2.715(c) petition was filed by the Commonwealth of Pennsylvania on August 23, 1979 signed by Governor Thornburgh and designating that the Attorney General's office will represent the Commonwealth. The Office of Consumer Advocate, a part of the Department of Justice of the Commonwealth of Pennsylvania, filed on August 15, 1979 a request to participate pursuant to §2.715(c). By a filing dated August 15, 1979, the Assistant Solicitor for Dauphin County filed a "petition to intervene" in this proceeding on behalf of the County and County Commissioners (hereinafter Dauphin County). However, the present parties to the proceeding were informed by Chairman Smith by conference call that the County desires to participate pursuant to §2.715(c). For the reasons set forth below, the NRC Staff does not now oppose the participation of any of these petitioners. However, we argue that the Office of Consumer Advocate is not an "interested" state agency within the meaning of §2.715(c) and that

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their participation should be determined based upon the criteria governing discretionary grants of opportunity to participate in NRC proceedings. We further argue that their present filing is insufficient to determine whether those criteria support granting them an opportunity to participate.

Argument

The Commonwealth of Pennsylvania and Dauphin County are, respectively, the state and county in which the facility is located. The Atomic Energy Act requires that states in which the facility is located be provided an opportunity to participate in proceedings under the Act, without taking a position on the issues to be resolved. Section 274 of the Atomic Energy Act, 42 U.S.C. 2021(1). The Commission has, in §2.715(c) of the Rules of Practice, extended this opportunity to interested counties as well, acting pursuant to §161 of the Atomic Energy Act which "grants broad discretionary authority to the Commission to obtain information, make investigations or hold hearings as it deems necessary." Statement of Considerations accompanying May 26, 1978 amendment to 10 C.F.R. §2.715(c). 43 F.R. 17798 (April 26, 1978). Accordingly, it follows that the county in which the facility is located is an "interested . . . county" within the meaning of the regulation.

A much more difficult problem is presented by the petition filed by the Office of Consumer Advocate. In the explanation of its interest in the proceeding, that Office relies solely upon its responsibility to represent the interests of consumers, stating that its position is "that the Board should make its decision narrowly and that the economic burden on ratepayers should not be

increased by an extended proceeding in this forum on the future of nuclear power." The Consumer Advocate further states that it "seeks to protect consumers from bearing all of the costs associated with any decision regarding Three Mile Island 1."

It is a settled principle that economic interest of ratepayers is not sufficient to establish standing to intervene as of right under §2.714(a) since concern about electricity rates is not within the zone of interests sought to be protected by the Atomic Energy Act or the National Environmental Policy Act. Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), ALAB-333, 3 NRC 804, 806 (1976). There is very little NRC case law construing the interest requirement of §2.715(c), and we have been unable to find any case where the question of an interest not within the zone of interests arguably protected by the statute is presented. The only discussion of the interest requirement of §2.715(c) is found in a case involving a California agency's participation in the Exxon reprocessing proceeding, where the question is framed in terms of whether that agency's statutory duty (at that time) to make findings regarding ultimate waste disposal and/or recycling was sufficient to establish an interest in the Exxon proceeding on a facility located in a distant state (Tennessee). Both the Licensing and Appeal Boards found that the agency's interest was adequate. Exxon Nuclear Company, Inc. (Nuclear Fuel Recovery and Recycling Center), LBP-77-59, 6 NRC 518, 523-24 (1977); aff'd, ALAB-447, 6 NRC 873, 879-80 (1977). The separate opinion of

Mr. Sharfman recites, at note 8 (6 NRC 875-76), five cases involving licensing of power reactors in which neighboring states were granted leave to participate as interested states. The thrust of his opinion and that of Mr. Salzman (who together formed the majority) can fairly be read to support the idea that the interest requirement of §2.715(c) has real content, requiring a showing beyond a desire to participate in the proceeding.

We believe that reason and the available case law point to a conclusion that the interest requirement of §2.715(c) is sufficiently similar to the standing requirement of §2.714(a) that, at a minimum, the interest asserted by a state agency must be arguably within the zone of interests sought to be protected by the Atomic Energy Act and National Environmental Policy Act. The economic interests of ratepayers/consumers do not fall within this category.

Although we do not believe that the petition filed by the Consumer Advocate demonstrates compliance with the interest requirement of §2.715(c), we note that the petition refers to participation before the state Public Utility Commission and general familiarity with the financial ability of Metropolitan Edison. It is possible, therefore, that the Consumer Advocate meets the criteria for the Board to grant an opportunity to participate as a matter of discretion. NRC adjudicatory boards have authority to allow intervention as a matter of discretion to some petitioners who do not meet judicial standing tests. Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976). We know of no reason why this authority does not apply equally well to petitioners to participate as interested governmental entities under §2.715(c). Exercise of this discretion

is determined by all the facts and circumstances of the particular case, and the factors to be considered in making the determination include those in §2.714(a) relating to nontimely petitions and in §2.714(d) relating to intervention in general. Id. at 616. Foremost among the factors which are to be taken into account is whether a petitioner's participation would likely produce a valuable contribution to the Commission's decision-making process. Virginia Electric and Power Company (North Anna Power Station, Units 1 and 2), ALAB-363, 4 NRC 631 (1976).

The NRC Staff does not object to the Consumer Advocate's amending its petition to attempt to make a showing that it can add significantly to the consideration of issues relating to financial qualifications. We perceive no basis on the face of the Consumer Advocate's petition for participation, discretionary or otherwise, on other aspects of the proceeding.

Conclusion

For the reasons set forth herein, the NRC Staff supports the admission to this proceeding of the Commonwealth of Pennsylvania and Dauphin County as participants pursuant to 10 C.F.R. §2.715(c). We argue that the Pennsylvania Office of Consumer Advocate does not fulfill the interest requirement of §2.715(c) but may, upon an amended showing, warrant admission to participation at the discretion of the Board.

Respectfully submitted,

Marcia E. Mulkey
Marcia E. Mulkey
Counsel for NRC Staff *MEC*

Dated at Bethesda, Maryland
this 4th day of September, 1979.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

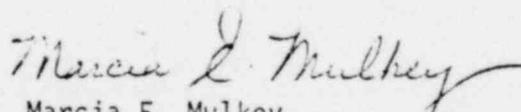
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(Three Mile Island, Unit 1))

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the above-captioned matter. In accordance with §2.713, 10 C.F.R. Part 2, the following information is provided:

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Respectfully submitted,


Marcia E. Mulkey
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 4th day of September, 1979

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

METROPOLITAN EDISON COMPANY,
ET AL.

(Three Mile Island, Unit 1)

Docket No. 60-289

POOR ORIGINAL

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC RESPONSE TO PETITIONS OF THE COMMONWEALTH OF PENNSYLVANIA, THE PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE, AND DAUPHIN COUNTY TO PARTICIPATE PURSUANT TO 10 C.F.R. §2.715(c)" and "NOTICE OF APPEARANCE" for Marcia E. Mulkey 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 4th day of September, 1979.

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