

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	}	
OMAHA PUBLIC POWER DISTRICT	}	Docket No. 50-285
(Fort Calhoun Station, Unit 1)	}	

NRC STAFF'S RESPONSE TO REQUEST FOR HEARING
BY ALAN H. KIRSHEN, ACTING AS AN INDIVIDUAL

I. Introduction

By petition filed on October 9, 1979, Alan H. Kirshen, acting on his own behalf as an individual, requested a hearing on Omaha Public Power District's (Licensee) application for an amendment to the operating license for the Fort Calhoun Station, Unit 1, which would authorize an increase in the licensed power level for the facility from 1420 MWt to 1500 MWt.

A notice of Proposed Issuance of Amendment to Facility Operating License with regard to this matter was published in the Federal Register on September 7, 1979 (44 F.R. 52389). That notice stated that the NRC is considering the issuance of an amendment to the facility operating license which would authorize: (1) an increase in licensed power level; (2) the use of fuel manufactured by the Exxon Nuclear Company, Inc. for the next cycle of operation; and (3) the use of Exxon analytical methods. The notice provided that the Licensee could request a hearing and that interested persons could seek to intervene with regard to such matters by filing

1354 178

G 791119 137

written petitions to intervene on or before October 9, 1979. The instant petition was apparently filed pursuant to such notice.

For the reasons set forth below, the NRC Staff (Staff) opposes Petitioner's request for hearing as presently constituted.

II. NRC Staff's Position

A. Intervention as of Right

10 CFR § 2.714(a)(2), as well as the Notice of Proposed Issuance of Amendment to Facility Operating License (44 F.R. 52389,52390) require that a petition for leave to intervene set forth with particularity:

- (1) the interest of the Petitioner in the proceedings,
- (2) the manner in which that interest may be affected by the results of the proceeding, and
- (3) the reasons why intervention should be permitted with particular reference to:
 - (a) the nature of the Petitioner's right under the Atomic Energy Act to be made a party to the proceeding,
 - (b) the nature and extent of the Petitioner's property, financial, or other interest in the proceeding, and
 - (c) the possible effect of any order which may be entered in the proceeding on the petitioner's interest.

Moreover, to establish an interest which would allow intervention as of right, a Petitioner must show that it meets the requirements for judicial standing. Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-27, 4 NRC 610 (1976). These standards, set forth in Sierra Club v. Morton, 405 U.S. 272 (1974); Barlow v. Collins, 397 U.S. 159 (1970); and Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970), require a showing that (1) the action being challenged could cause injury-in-fact to the person seeking standing and (2) such injury is arguably within the zone of interests protected by the statute governing the proceeding. The potential injury alleged must be particularized to the individual petitioner and not one which is "shared in substantially equal measure by all or a large class of citizens." Edlow International Company, CLI-76-6, 3 NRC 563, 576 (1976), quoting Warth v. Seldin, 422 U.S. 490, 499 (1975).

In his petition of October 9, 1979 (hereinafter referred to as Kirshen Request for Hearing), Mr. Kirshen does not identify his interests or the manner in which those interests might be affected by the proposed licensing action but, instead, states that the basis for his request for hearing is provided in the October 9, 1979 Request for Hearing of the Natural Resources Committee of the Citizens Advisory Board of the Metropolitan Area Planning Agency which he incorporates by reference into his own Request for Hearing. As set forth in detail in the Staff's concurrently-filed response to the Citizens Advisory Board's Request for Hearing, that Request for Hearing does not establish the standing of the Citizens Advisory Board to intervene. In

addition, an examination of that Request for Hearing reveals that it is wholly devoid of any allegations that would establish the particularized interests of Mr. Kirshen, demonstrate that those interests are within the zone of interests protected by the Atomic Energy Act or the National Environmental Policy Act (NEPA), or show the manner in which Mr. Kirshen's interests might be affected by the proposed licensing action for the Fort Calhoun facility. Thus, for example, there is no allegation that Mr. Kirshen resides^{1/} or conducts substantial activities^{2/} within the geographical zone that might be affected by operation of the Fort Calhoun facility pursuant to the proposed license amendment. In sum, there is nothing either in Mr. Kirshen's Request for Hearing or in that of the Citizen's Advisory Board to which he refers which establishes Mr. Kirshen's standing to intervene as a matter of right under 10 CFR § 2.714. Consequently, it is the Staff's view that Mr. Kirshen's request for hearing, having failed to comply with the requirements of 10 CFR § 2.714 with regard to intervention as of right, should be denied in this regard.

^{1/} Residence has been found sufficient, standing alone, to establish interest for individuals concerned about injury to their persons or property from operation of a reactor. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station), ALAB-535, 9 NRC 377 (1979); Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-522, 9 NRC 54, 56 (1979).

^{2/} Pursuit of everyday activities in the vicinity of a reactor site, Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-183, 7 AEC 222, 226 (1974), use of the surrounding area for recreational purposes, Philadelphia Electric Co. et al. (Peach Bottom Atomic Power Station, Units 2 & 3), CLI-73-10, 6 AEC 173 (1973), or part-time (such as student) residence, Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 & 2), ALAE-413, 5 NRC 1418, 1421 (1977), may, depending on the circumstances, demonstrate an interest which could be affected by facility operation.

B. Discretionary Intervention

Although a petitioner may lack standing to intervene as of right under judicial standing concepts, it may nevertheless be admitted as a party in the Licensing Board's discretion. The Licensing Board is to be guided in the exercise of its discretion in this vein by a consideration of:

- (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;
- (3) the possible effect on the petitioner's interest of any order which may be entered in the proceeding;
- (4) the availability of other means to protect the petitioner's interest;
- (5) the extent to which the petitioner's interest will be represented by existing parties; and
- (6) the extent to which petitioner's participation will inappropriately broaden or delay the proceeding. Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-27, 4 NRC 610, 616 (1976).

The primary factor is the significance of the contribution that a petitioner might make. Pebble Springs. The need for a showing as to potential contribution is especially strong in an operating license proceeding where no petitioners have established standing as of right and where, absent such a

showing, no hearing would be held. Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 & 2), ALAB-413, 5 NRC 1418, 1422 (1977).

In the instant case, no information is presented either in Mr. Kirshen's Request for Hearing or in that of the Citizens Advisory Board to which he refers that would allow a determination as to Mr. Kirshen's potential contribution as an individual to the development of a sound record or a decision on any of the other factors bearing on discretionary intervention. Accordingly, it is the Staff's view that discretionary intervention cannot be granted based on Mr. Kirshen's Request for Hearing as it is presently constituted.

C. Aspects as to Which Intervention is Sought

10 CFR § 2.714(a)(2) requires that any petition to intervene set forth with particularity the specific aspect or aspects of the subject matter of the proceeding as to which Petitioner wishes to intervene. Although this provision has not yet been addressed extensively in NRC case law, it is apparent that the provision requires identification of aspects with sufficient specificity to provide notice to other participants of the issues likely to be litigated and, therefore, of the scope of the contested subject matter in the proceeding.

Mr. Kirshen's Request for Hearing does not, on its face, identify any aspects of the proposed licensing action as to which intervention is sought. The Citizens Advisory Board's Request for Hearing, incorporated by reference

into Mr. Kirshen's petition, does indicate that the Citizens Advisory Board has considered the environmental and safety implications of the proposed increase in authorized power level and that citizens who might be affected by the proposed increase in power level and by resulting increased thermal discharges from the Fort Calhoun facility should be afforded the opportunity to be heard on the matter. Thus, it is possible that Mr. Kirshen wishes to intervene with regard to some as yet not clearly defined safety and environmental aspects of the proposed power level increase. However, based on the papers filed by Mr. Kirshen, this is a matter of speculation and, consequently, it is the Staff's view that Mr. Kirshen has not clearly identified "with particularity... the specific aspect or aspects of the subject matter of the proceeding as to which [he] wishes to intervene." 10 CFR § 2.714(a)(2).

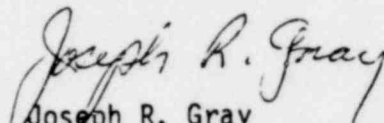
III. Conclusion

Based on the foregoing and for the reasons set forth above, it is the Staff's position that Mr. Kirshen:

- (1) has failed to demonstrate the required standing to intervene as of right under 10 CFR § 2.714;
- (2) has failed to set forth any basis upon which the Licensing Board could admit him as a matter of discretion; and
- (3) has not adequately set forth, with particularity, the specific aspect or aspects of the subject matter of the proceeding as to which he wishes to intervene as required by 10 CFR § 2.714(a)(2).

Consequently, it is the Staff's position that Mr. Kirshen's Request for Hearing should be denied in its present form. However, under 10 CFR § 2.714(b), Mr. Kirshen may amend his Request for Hearing up to 15 days before the first prehearing conference in this proceeding in an attempt to cure the existing deficiencies.

Respectfully submitted,


Joseph R. Gray
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 29th day of October, 1979

1354 185