



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

BOSTON EDISON COMPANY, et al.

(Pilgrim Nuclear Generating Station, Unit 2)

) Docket No.

) 50-471

RESPONSE OF INTERVENOR CLEETONS IN OPPOSITION
TO PETITION OF THE GOVERNOR'S MASSACHUSETTS
OFFICE OF ENERGY RESOURCES FOR LEAVE TO
PARTICIPATE AS AN INTERESTED STATE AGENCY

The intervenor Cleetons oppose the petition of the Governor's Massachusetts Office of Energy Resources (the "Office") for leave to participate as an interested state agency in the referenced proceeding because the Office has failed to comply in several important respects with the requirements set forth in 10 C.F.R. § 2.714 governing non-timely petitions to intervene.

1. On January 14, 1974, the Atomic Energy Commission published in the Federal Register (39 F.R. 1786) a Notice of Hearing on applications for construction permits in the above-mentioned proceeding. The notice provided that a person whose interest might be affected by the proceeding could file with the Commission a petition for leave to intervene within thirty (30) days of the date of publication

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of the notice in the Federal Register.

On or before February 13, 1974, the deadline for filing set forth in the notice, four separate timely petitions for leave to intervene were filed. By Memorandum and Order of this Board, dated May 30, 1974, these four petitions were granted and the petitioners were granted status as parties intervenor in this proceeding; namely, the Commonwealth of Massachusetts, the Massachusetts Wildlife Federation, Daniel Ford, and Allan and Marion Cleeton (appearing jointly).

The aforesaid Notice of Hearing of January 14, 1974, provided that:

"A petition to intervene must be filed ... by February 13, 1974. A petition for leave to intervene which is not timely will not be granted unless the Board determines that the petitioner has made a substantial showing of good cause for failure to file on time and after the Board has considered those factors specified in 10 CFR 2.714(a)(1)-(4) and 2.714(d)." [39 F.R. 1788] ^{1/}

1/ The pertinent portion of the Commission's Regulations referred to in the Notice of Hearing provides as follows: "Nontimely filings will not be entertained absent a determination ... that the Petitioner has made a substantial showing of good cause for failure to file on time, and with particular reference to the following factors in addition to those set out in Paragraph (d) of this Section: (1) The availability of other means whereby the Petitioner's interest will be protected, (2) The extent to which the Petitioner's participation may reasonably be expected to assist in developing a sound record, (3) The extent to which Petitioner's interest will be represented by existing parties and (4) The extent to which Petitioner's participation will broaden the issues or delay the proceeding." 10 CFR 2.714(a).

In support of its petition to intervene which was filed in person at the hearings convened on May 24, 1979, in Plymouth Mass., the Office alleges that it is an interested state agency established by a Directive of the Governor of Massachusetts on March 13, 1979, and is "responsible for all state policy regarding new energy facilities." The Office states that the reason it did not file an intervention petition earlier is the fact that it "was only recently established by the Governor of the Commonwealth of Massachusetts on March 13, 1979." The Office further alleges in its petition that its position "is not fully consistent with that taken by the Attorney General under 10 C.F.R. § 2.714." Although the affidavit attached to the Office's petition to intervene contains broad language as to the specific issues in this proceeding seeking to be addressed by the Office, counsel for the Office orally stipulated to this Board at the May 24, 1979 hearing that its participation, if granted, would be limited to the "need for power" issue.

2. This Board should deny the petition filed by the Office for its failure to satisfy the requirements for intervention established by the Commission in its Rules of Practice (10 C.F.R. § 2.714) and in the January 14, 1974 Notice in this proceeding. Specifically the petition is untimely (by five (5) years and three (3) months) and the petitioner has not made a substantial showing of good

cause for failure to file on time, with particular reference to the four enumerated factors set forth in § 2.714(a). It is important to note that, contrary to the statements of the Office in its petition, §2.715 (c) does not ipso facto relieve a potential intervenor from compliance with §2.714(a), but rather sets forth certain additional criteria applicable to a state agency intervenor, such as, e. g., the permitting of the state agency to not take a position on the issues. The NRC Staff, in its response in favor of the Office's petition, appreciates this necessity to meet the criteria of §2.714(a) by noting that the petition "addresses in part the criteria contained in §2.714(a)."

3. The Office makes no claim that it, or the Governor, or the director of the Office, Joseph S. Fitzpatrick, were not aware of this construction licensing proceeding at least back to the time of the inauguration of the present Governor into office in January 1979. And the Office of Energy Resources itself, although undergoing a name change on March 13, 1979, when by Governor's Directive the Governor's Office of Energy Policy was changed to the Governor's Office of Energy Resources (with the same personnel, the same offices, and the same director, Joseph Fitzpatrick, at its head), has been in existence in substance and in form (except for the name change) for a number of years; the Energy Policy Office was created by Governor

Dukakis ^{2/} early in his administration to address precisely the same issues which the present Office of Energy Resources is addressing, namely state policy regarding energy supply. Thus it is a stark fact that the Governor's Energy Policy Office could have intervened in these proceedings several years ago but did not -- altogether such Office did intervene in 1976, 1977, and 1978 in proceedings involving Boston Edison Company before the State Department of Public Utilities. The deadline for filing intervention petitions established under §2.714 would be nullified if an agency can conspicuously sit on its hands all through the proceeding, and then solely because of a new incoming Governor with different politics (who also sat on his hands for two (2) months before changing the name of the Energy Policy Office which then sat on its hands for two (2) more months before filing its petition to intervene), be allowed to intervene in a proceeding. Surely even the NRC policy "encouraging participation of governmental entities", cited by NRC

^{2/} Governor Michael Dukakis served from January, 1975 for four (4) years, preceding present Governor King.

Staff in its response, does not permit such a whole-scale wrenching and tearing apart of the careful standards laid out in §2.714(a).

4. Denial of this petition to intervene is appropriate on the reasoning set forth in Duquesne Light Company et al. (Beaver Valley Power Station, Unit 2), ALAB-208 (June 10, 1974), where the Appeal Board affirmed a decision denying the untimely petition for leave to intervene which had been filed by the City of Cleveland. There the petition was less than two (2) months late. Here the petition is more than five (5) years four (4) months late. There, as here, an offered justification for the late filing was that the petitioner had thought that another entity would protect its interests. In our case the Energy Office laments that the Massachusetts Attorney General, representing the Commonwealth of Massachusetts and its citizens, and which raised the issue of "need for power" in its timely intervention petition filed in 1974 and has vigorously pursued the matter ever since, is somehow not representing "its position". The Office fails to point out in what manner on the "need for power" issue the Attorney General is failing in his statutory duty to protect the Commonwealth's interest. One suspects that what is really at issue here is the politics of the new Governor (who has been in office some 5 1/2 months now) and his desire to have his politics represented in this proceeding.

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The Rules of Practice should not be so bent to permit this grossly untimely intervention.

5. In §2.714(a), it is provided that nontimely filings will not be entertained absent a determination that the petitioner has made a substantial showing of good cause for failure to file on time, with particular reference to four factors. In ALAB-208, the Appeal Board strongly suggested that, under §2.714(a), "the enumerated factors are to come into play only in circumstances where there has been a reasonable excuse tendered for the tardiness." However, the Appeal Board acknowledged that §2.714 can also be read as requiring consideration of the enumerated factors, whether or not a reasonable excuse for the late filing has been shown. Accordingly, even though the Office of Energy Resources has not tendered a reasonable excuse, we now consider the four factors enumerated in §2.714 as they relate to its petition.

6. The first factor is the availability of other means whereby the petitioner's interest will be protected. The petitioner's interest, presumably, is to represent the Commonwealth, though such representation is by fiat of the Governor rather than by statute, and it seeks to

address the specific issue of "need for power." The Attorney General, who statutorily represents the Commonwealth, has vigorously pursued the issue of "need for power" in this proceeding since 1974. Both Boston Edison and NRC Staff have generally argued a position to the contrary of that advanced by the Attorney General. Thus, applying the first of the four factors in 2.714(a) by which an untimely petition may be measured, one must conclude that there are available other means whereby the petitioner's interest will be protected.

7. The second factor is the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record. The petitioner claims no particular learning, experience, expertise or evidence not possessed by a party to this proceeding. And in fact, the Attorney General has already indicated his willingness and intent to make available all necessary State information (such as data and materials provided by the Department of Public Utilities, etc.) on the issue of need for power. Again the conclusion is inescapable that the only new input which would be provided by the Governor's Office of Energy Resources would be an infusion of the political position of the new Governor which apparently differs from that of his predecessor on the issue of need for Pilgrim 2. Such a political input should play no part in these proceedings.

Thus, there is no showing that petitioner's participation will assist in developing a sound record.

8. The third factor is the extent to which petitioner's interest will be represented by existing parties. As already stated, the Commonwealth of Massachusetts is already represented by the Attorney General of Massachusetts who has committed extensive staff resources to this representation -- on several issues including the need for power.

9. The fourth factor is the extent to which the petitioner's participation will delay the proceedings. This proceeding has already gone on for five (5) years, and already has five (5) parties, viz., the applicant, the NRC Staff, the Commonwealth of Massachusetts, and two (2) intervenors. The addition of another party will inevitably delay the proceeding by creating the need to co-ordinate yet another schedule into the planning of hearings, preparation of proposed findings and conclusions, filing of briefs, and the rest of the procedural schedule of this proceeding, in which coordination of the various parties' schedules with those of the three Board members has been difficult enough with present parties. Moreover, the progress of the hearing will be slowed by the presentation of a direct case, objections, and cross-examination by yet another party.

10. Finally, this Board has already spoken and enunciated the standards in this very proceeding for late filing, in the matter of another potential intervenor who sought intervention status in July, 1974, some five (5) months after the deadline had passed. One of the reasons set forth by that intervenor

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for its late filing was the fact that it was incorporated in June, 1974, only a few weeks before it filed its petition to intervene. Nevertheless this Board held the petition to be untimely. See Memorandum and Order of this Board dated August 30, 1974, denying intervention to Plymouth County Nuclear Information Committee, Inc.; affirmed by the Appeal Board in a decision dated October 22, 1974 (ALAB-238). Surely a common standard for the treatment of untimely petitions to intervene should prevail in this proceeding.

11. For all of the foregoing reasons, the late intervention petition of the Governor's Office of Energy Resources should be denied.

Respectfully submitted,
Alan and Marion Cleeton
By their attorney,

William S. Abbott

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Dated at Boston, Massachusetts
June 1, 1979

CERTIFICATE OF SERVICE

I hereby certify that copies of "Response of Intervenor Cleetons in Opposition to Petition of the Governor's Massachusetts Office of Energy Resources for Leave To Participate as an Interested State Agency" in the above numbered proceeding have been served upon all parties listed on the attached Pilgrim Unit 2 Service List by deposit in the United States mail, first class, postage prepaid, this 1st day of June, 1979.

William S. Abbott

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