

LOCAL

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
TEXAS UTILITIES GENERATING COMPANY, <u>ET AL.</u>)	Docket Nos. 50-445
)	50-446
(Comanche Peak Steam Electric Station,)	
Units 1 and 2))	

NRC STAFF MEMORANDUM ON THE APPLICABILITY OF
ALAB-549 TO A DETERMINATION ON THE PENDING
PETITIONS FOR LEAVE TO INTERVENE IN THIS PROCEEDING



I. INTRODUCTION

The Atomic Safety and Licensing Board (Board) convened a Special Prehearing Conference on May 22, 1979 to consider petitions for leave to intervene filed in this proceeding by Citizens Association for Sound Energy (CASE), Citizens for Fair Utility Regulation (CFUR) and jointly by Texas Association of Community Organizations for Reform Now (ACORN) and West Texas Legal Services (WTLS) and the unopposed petition of the State of Texas for leave to participate as an interested State pursuant to 10 CFR §2.715(c). During the prehearing conference, the Nuclear Regulatory Commission Staff (Staff) cited and discussed a decision, ALAB-549,^{1/} of the Atomic Safety and Licensing Appeal Board (Appeal Board) issued four days earlier, May 18, 1979, in its presentation regarding certain of the petitioners' standing to intervene as a matter of right. Since the Board and the other participants, for good reason, were not familiar with the decision, the Board granted the request of Counsel for the Applicants that the participants be permitted until June 4, 1979, to file a memorandum addressing the applicability of ALAB-549 to a determination on the pending petitions for leave to intervene in this proceeding.

^{1/} Houston Lighting and Power Company (South Texas Project, Units 1 and 2), ALAB-549, ___ NRC ___ (May 18, 1979).

146
A26
145

(9)

As discussed more fully below, the principles enunciated in ALAB-549 are applicable to consideration of the petitions in this proceeding and their application supports the Staff's view that each of the three petitioners has demonstrated standing as a matter of right in its representative capacity derived from the interests of at least one of its members.^{2/}

II. APPLICABILITY OF ALAB-549

The Appeal Board, in ALAB-549, affirmed the Licensing Board's April 3, 1979 decision (LBP-79-10) granting the petitions for leave to intervene filed by

^{2/} In this regard, the Staff is directing its views to CASE, CFUR and ACORN. WTLS, originally a joint petitioner with ACORN was deleted in the Supplemental Petition filed by ACORN et al. on May 7, 1979 and the Woods and Bishops substituted. Thus, the question of the representational standing of WTLS is no longer an issue in this proceeding and will not be addressed herein.

This does not, however, eliminate the need to consider whether the substitution of the Woods and Bishops results in the petition being considered as untimely with respect to them. As noted at the prehearing conference (See, Tr. 66-70), if the WTLS petition of March 3, 1979 was truly filed on behalf and at the request and initiation of the Woods and Bishops who were not identified therein to protect their anonymity, their subsequent identification and substitution for WTLS does not cause the petition to be untimely in our view. If, however, the petition was filed by and on behalf of WTLS on its own initiative and not at the request of a then-existing client, the recruitment of such client(s) thereafter to sponsor the petition in hopes of satisfying the Commission's regulations for standing would, under the teachings of Washington Public Power Supply System (WPPSS Nuclear Project, No. 2), LBP-79-7, 9 NRC ____, (March 6, 1979), cause the petition to be treated as late-filed and require a demonstration that the factors set forth in 10 CFR §2.714 for late-filed petitions were in the petitioners favor. As stated at the prehearing conference, counsel for the Woods and Bishops' effort in this regard (Tr. 121-124) was, in our belief, unpersuasive (Tr. 127-128).

As noted by the Board Chairman, the foregoing issue may be academic in view of counsel for the Woods and Bishops willingness to remove them as named parties in the event that his other client, ACORN, is admitted (Tr. 70-71).

two organizations in their representative capacity. Many of the Applicants' arguments opposing the petitions in this proceeding are similar to those raised by the Applicants in the South Texas proceeding and considered in ALAB-549. We consider in turn each similar argument.

Applicants claim that an organization which states that it has members whose interest will be affected by the proceeding and which identifies such members (as each petitioner has done in this proceeding) must nonetheless demonstrate "actual and genuine membership".^{3/} They advocate that the Board must look behind allegations of membership to assure that the appropriate "indicia of membership" exist (Tr. 18). The Applicants argue the Board must assure itself that there is "meaningful membership" (Tr. 20), citing Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977) and Health Research Group v. Kennedy, No. 77-0734, (D.D.C., March 13, 1979).

Applicants argument must be rejected as was the similar argument in ALAB-549. In that decision, the Appeal Board noted with respect to the applicability of Health Research Group^{4/} to organizations stating that they have members:

"Applicants' reliance on Health Research Group v. Kennedy, No. 77-0734 (D.D.C., filed March 13, 1979), is misplaced. The decision rejected the claim of an organization without members

^{3/} See "Applicants' Answer in Opposition to Petition for Leave to Intervene by ACORN and WTLS", dated April 13, 1979, p.7.

^{4/} In the Applicant's answer to the various petitions and at the prehearing conference, the Applicants also cite Hunt, supra. In Hunt, the Supreme Court was confronted with an organization's claim to associational standing on behalf of third parties who were not at least formally, its members. In upholding the standing of the organization, the Court determined that the parties represented (while not members) were functionally equivalent to members because they possessed all the "indicia of membership". 432 U.S. 333, at 344.

to have standing solely as the representative of its contributors and supporters. That is not the case here." [cite to another footnote in the opinion omitted]. (Emphasis in original). Slip Op. at 6, fn.11.

The Staff submits that Applicants' reliance here on Health Research Group is likewise misplaced. As the Applicants recognize, that decision presents the situation where an organization sought standing based upon the interest of non-member third parties. The Staff agrees that, absent membership of such third parties, an organization must then base its standing on the criteria set forth in Health Research Group and in Hunt, i.e., "indicia of membership".^{5/} As the Staff stated at the prehearing conference (Tr. 26), ALAB-549 makes clear that evidence of "indicia of membership" is not necessary when an organization states that it has members and provides affidavits of individuals attesting to their membership. This has, in fact, been done by each of the three organizations in this proceeding. The Board need not delve behind the statements of membership made under oath by means of affidavit, attached to petitions or presented at the prehearing conference unless there has been a challenge as to the veracity of the statements. No challenge has been raised in this proceeding.

The essence of Applicants' second challenge to the standing of petitioners is that there has not been a satisfactory showing by the identified members of

^{5/} "Indicia of membership" include the ability to elect the organization's governing body and the financing of its activities. Hunt supra, 432 U.S. 333, at 344-345 and Health Research Group, supra, Slip. Op. at 11-12. We note that the representative of one of the Comanche Peak petitioners, CASE, offered at the prehearing conference (Tr. 36) to provide evidence of such "indicia of membership". In particular, Mrs. Ellis stated that she had personal checks from one of the identified CASE members (Marilyn Stinson) "which go back to 1975 which indicates she has participated financially as well as otherwise in the proceedings of CASE" (Tr. 36). Also, according to Mrs. Ellis, "we do have elections, and she [Marilyn Stinson] does have the opportunity to vote, and the officers are elected, and are qualified to represent all the members" (Tr. 36).

each petitioner organization of personal standing sufficient to confer on the organization standing in a representative capacity. Applicants believe that a statement of residence in close proximity to the facility, coupled with an expression of concern about injury to personal property resulting from operation of the plant is insufficient to establish personal standing. But in ALAB-549, the Appeal Board noted that Applicants did not and could not successfully challenge the personal standing of a member who made such a statement. As the Appeal Board pointed out:

"His allegations of residence within seven miles of the South Texas facility, coupled with his expressed concern about injury to his person and property should the plant malfunction were sufficient to demonstrate his 'real stake' in the outcome of the proceeding. Virginia Electric and Power Co. (North Anna Station, Units 1 and 2), ALAB-522, 9 NRC ____, ____ (January 26, 1979) (slip opinion at 3-4) and cases there cited." ALAB-549, Slip. Op. at 4, fn.8.

The Staff believes that there has been a comparable showing of personal standing by at least one member of each organization. With respect to CASE, the affidavits of CASE members Marilyn and Edward Stinson contain their statements of residence within five miles of the plant and their adoption of the contentions in the CASE petition "in an effort to assure our health, safety and the presentation of no danger to our property."^{6/} From CFUR, there is the petition filed by member Nancy Jacobson and her affidavit attesting to residence approximately 35 miles from Comanche Peak. The CFUR petition evidences her belief that her residence in such close proximity to Comanche Peak will affect her "health, safety and value of property and livelihood" ... "either by routine operation of Comanche Peak or by an accident involving release of

^{6/} See Affidavits of Marilyn Stinson and Edward Stinson, dated February 24, 1979, attached to CASE petition of February 28, 1979.

radioactive elements". With respect to ACORN, the Staff believes that there is personal standing on the part of member Ruth Martin on the basis of the representations in her affidavit. See "NRC Staff Memorandum Regarding Contentions and Further Answer to ACORN/WTLS Petition for Leave to Intervene", dated May 17, 1979, p.2. She avers to residence within approximately 35 miles of Comanche Peak and her personal belief that her health, safety and property would be adversely affected by radioactive emissions from Comanche Peak. Although the statements by these individuals may not be as specific as Applicants believe necessary, they are, in our opinion, "sufficient to demonstrate that each has a real stake in the outcome of this proceeding." ALAB-549, Slip. Op. at 4, fn.8. Consequently, the organizations of which these individuals are members can acquire standing based on the personal standing of the identified members.

An additional argument made by Applicants in their pleadings and at the pre-hearing conference is that the purposes of these organizations are not germane to the interests they seek to protect (Tr.21, 56, 96). The Staff agrees that the interests of members which a group seeks to represent (and which confer standing upon the group) must be "germane to the organization's purpose." Hunt, supra. As indicated in ALAB-549, that question must be determined on the particular facts based on the purpose of the organization and the interest of its members.^{7/}

^{7/} "No doubt there are instances where the concerns of an organization and those of its members are so disparate that the former may not be an appropriate representative of the latter's interests. But such considerations are not present in this case. We agree with the Licensing Board that the stated purposes of 'Citizens Concerned About Nuclear Power' are sufficiently germane to warrant its representation of Mr. Bunk's essentially similar concerns in a proceeding looking toward licensing operation of a nuclear power plant." (footnote and citation omitted) ALAB-549, Slip. Op. at 6.

As shown below, the purposes of CASE, CFUR, and ACORN are sufficiently germane to warrant their representation of particular members. First of all, we note that CASE's petition states that CASE has been involved "in every licensing proceeding related to this plant [Comanche Peak] of which petitioners was aware since application was filed for a construction permit..." "Petition for Leave to Intervene By CASE (Citizens Association for Sound Energy)", February 28, 1979, p.1. The petition further describes CASE's involvement in various city and state proceedings in Texas related to Comanche Peak. At the prehearing conference, the CASE representative stated that CASE was originally formed to intervene in hearings before the Dallas City Council "on whether or not to allow DP&L [Dallas Power & Light] participation in the Glen Rose plant" (Tr. 37). According to Mrs. Ellis, this was CASE's original purpose and CASE was primarily concerned with financial aspects of Comanche Peak construction. CASE subsequently expanded its concerns to encompass other aspects of the Comanche Peak construction (Tr. 37-38). According to CFUR's petition,^{8/} it is an organization of citizens of Tarrant County, Texas and has participated in "public utility rate cases". CFUR further states that its interest in regulatory proceedings has been from the standpoint of "the residential consumer with an environmental awareness."^{9/} Although the Applicants characterize ACORN as an organization which is principally concerned with the economic well-being of low-income individuals (Tr. 57), ACORN's petition (as amended and supplemented) and its representation at the prehearing conference indicate that its purposes are not so narrow. The joint ACORN/WTLS petition states that ACORN is dedicated to the advancement of low to moderate

^{8/} "Petition for Leave to Intervene By Citizens For Fair Utility Regulation", dated March 3, 1979.

^{9/} See CFUR Petition, supra, p.1.

income persons.^{10/} At the prehearing conference, ACORN's representative stated that ACORN's purpose is to serve such individuals, "whether it be an economic matter or a safety matter, anything involving the local community." (Tr. 49). We believe that the foregoing establishes that the stated purposes of all three organizations are sufficiently germane to those of their members to warrant representation of their members in this proceeding. ALAB-549 Slip. Op. at 6.

The Staff also notes with respect to the Applicants' claim regarding the alleged lack of specificity in the petitioners' statements of interest, that the Appeal Board held:

"It is neither congressional nor Commission policy to exclude parties because the niceties of pleading were imperfectly observed. Sounder practice is to decide issues on their merits, not to avoid them on technicalities." ALAB-549, Slip. Op. at 11.

This policy must be borne in mind, as we believe the Board recognizes (Tr. 102-103) in assessing Applicant's objections to "the niceties of pleading" particularly on the part of CASE and CFUR, who are not represented by counsel.

III. CONCLUSION

The Staff believes that application here of the teachings in ALAB-549 confirms the Staff's view that the standing of CASE, CFUR and ACORN is firmly grounded and that they should be admitted as intervenors as a matter of right.

Respectfully submitted,

Marjorie B. Ulman

Marjorie B. Ulman
Counsel for NRC Staff

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

^{10/} See "Petition For Leave to Intervene and Request for Hearing", p.1, dated Mar 3, 1979.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
TEXAS UTILITIES GENERATING COMPANY, ET AL.) Docket Nos. 50-445
) 50-446
(Comanche Peak Steam Electric Station,)
Units 1 and 2))

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF MEMORANDUM ON THE APPLICABILITY OF ALAF-549 TO A DETERMINATION ON THE PENDING PETITIONS FOR LEAVE TO INTERVENE IN THIS PROCEEDING" 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 June, 1979:

Elizabeth S. Bowers, Esq., Chairman*
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Richard W. Lowerre, Esq.
Assistant Attorney General
Environmental Protection Division
P. O. Box 12548, Capitol Station
Austin, TX 78711

Lester Kornblith, Esq. Member*
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Mrs. Nancy Holdam Jacobson
CFUR
1400 Hemphill
Fort Worth, TX 76104

Richard Cole, Esq., Member*
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Mr. Richard Fouke
1668-E Carter Drive
Arlington, TX 76010

Nicholas S. Reynolds, Esq.
Debevois & Liberman
1200 17th Street, N.W.
Washington, DC 20036

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

Mrs. Juanita Ellis
President, CASE
1426 South Polk Street
Dallas, TX 75224

Atomic Safety and Licensing Appeal
Panel (5)*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Mr. Geoffrey M. Gay
West Texas Legal Services
406 W. T. Waggoner Building
810 Houston Street
Fort Worth, TX 76102

Docketing and Service Section (4)*
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Marjorie B. Ulman
Marjorie B. Ulman
Counsel for NRC Staff

426 154