UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
THE TOLEDO EDISON COMPANY	)	
AND THE CLEVELAND	)	
ELECTRIC ILLUMINATING	)	Docket No. 50-346
COMPANY	)	
	)	
(Davis-Besse Nuclear	)	
Power Station, Unit 1)	)	

LICENSEES' RESPONSE TO PETITIONER'S STATEMENT OF STANDING

INTRODUCTION

On May 16, 1979, the Commission ordered that the Davis-Besse Nuclear Power Station, Unit No. 1, then shut down for maintenance, remain shut down until Licensees, The Toledo Edison Company and The Cleveland Electric Illuminating Company, completed a number of safety-related changes to the satisfaction of the Director of Nuclear Reactor Regulation. As part of this May 16 Order, the Commission set a twenty-day period during which the Licensees or any person whose interest may be affected by the Order could request a hearing regarding the Order.

Prior to the May 16 Order, Ohio State Senator Tim McCormack ("Petitioner") had written on May 3, 1979, to the Chairman of the Commission concerning the safety of

Davis-Besse's operations and asking for a public hearing. On June 1, 1979, the Director of Nuclear Reactor Regulation wrote to Senator McCormack telling him about the Commission's May 16 Order and enclosing a copy. Senator McCormack then responded in a June 7, 1979, letter asking that a public hearing be conducted in Northern Ohio with respect to the Davis-Besse plant.

In response to Petitioner's request, the Commission issued an Order on July 5, 1979, directing that an Atomic Safety and Licensing Board be selected in accordance with 10 C.F.R. §2.105(e) "to determine whether the requester meets the requisite personal interest test and to conduct any hearing that may be required." The Licensing Board currently presiding over this matter was established on July 6, 1979. On July 19, 1979, the Board Chairman initiated a conference call which included Petitioners, Licensees' counsel and NRC Staff counsel. During that call, Petitioner agreed to submit a statement of his personal interest in the May 16 Order to which Licensees and the NRC Staff could respond.

On July 25, 1979, Petitioner wrote to the Board Chairman "relative to the issue of my personal standing to intervene as an interested person in the matter of the continuing operation of the Davis-Besse Nuclear Power Plant ...." This statement of personal interest ("Statement") offers three bases for Petitioner's standing: (1) proximity of his home and work to the Davis-Besse plant; (2) his official duties as a

state senator which bring Petitioner in contact with the "issue" of Davis-Besse's operation; and (3) Petitioner's status as a consumer of electricity generated at Davis-Besse. Licensees contend that these allegations do not demonstrate a personal interest which is even arguably affected by the May 16 Order or protected by statute. As a result, Licensees oppose Petitioner's request for a hearing concerning the continued operation of the Davis-Besse plant and ask that his request be denied.

ARGUMENT

I. PETITIONER LACKS STANDING TO REQUEST A HEARING PURSUANT TO THE COMMISSION'S MAY 16 ORDER

A. Petitioner Has Not Alleged an Injury Sufficient to Entitle Him to a Hearing.

Section 189(a) of the Atomic Energy Act, 42 U.S.C. §2239(a) ("the Act") directs the Commission to hold a hearing in any proceeding to grant, suspend, revoke or amend a license "upon the request of any person whose interest may be affected by the proceeding." The Commission's Rules of Practice for domestic licensing proceedings, 10 C.F.R. Part 2, complement the statute's language, permitting "any person whose interest

may be affected" by a proceeding to amend an operating license to request a hearing thereon. 10 C.F.R. §§2.105(a) and (d)(2), 2.714(a)(1).

Interpreting the Act's directive, the Commission has ruled that the Board should use contemporaneous judicial concepts of standing to determine whether a petitioner has made a sufficient allegation of personal interest to initiate a hearing. See, e.g., Portland General Electric Co. (Pebble Springs Nuclear Plan, Units 1 and 2), CLI-76-27, 4 NCR 610, 613-14 (1976). Therefore, Petitioner's entitlement to a hearing pursuant to the May 16 Order depends on whether his Statement satisfies the standing principles enunciated by the United States Supreme Court, lower federal courts and the Commission.

To have standing to request a hearing, Petitioner must: (1) allege an injury to him which has occurred or will probably result from the actions taken pursuant to the May 16 Order; and (2) allege an interest arguably with the zone of interest to be protected by the Atomic Energy Act. See, e.g., Warth v. Seldin, 422 U.S. 490 (1975); Sierra Club v. Morton, 405 U.S. 727 (1972); Portland General Electric Co., supra, 4 NRC at 613.

Petitioner resides in Euclid, Ohio, approximately 11 miles east of the center of Cleveland. According to the 1979 Edition of the Rand McNally Road Atlas, the Davis-Besse plant is located approximately 86 miles west of the center of

Cleveland by highway (73 miles by air).[1] Petitioner thus resides approximately 97 miles from the plant (84 miles by air). Petitioner is a state senator representing Ohio's 31st District which includes Euclid and has its westernmost boundary about seven miles east of the center of Cleveland. Thus Petitioner neither lives nor works anywhere near the vicinity of the Davis-Besse plant.

Petitioner states vaguely that, because of the "proximity" of his "home and work area" to the plant, he "would probably be affected" by "a significant escape of radioactive matter" from the plant. In fact, it is Petitioner's very distance from the plant that precludes injury to him sufficient to create standing. In the Final Environmental Statement for the construction of Units 2 and 3 of the Davis-Besse plant[2] (NUREG-75/083, September 1975, p. 7-2) the Commission states that the realistically estimated radiological consequences of each postulated plant accident (which takes into account weather patterns and Lake Erie flow patterns) would result in exposures to the population within 50 miles of the plant much smaller than exposures from naturally occurring radioactivity. The Commission also states that, given the probability of the

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1 Petitioner erroneously stated in his Statement that the plant is located approximately 66 miles from the center of Cleveland.

2 The proposed Units 2 and 3 are nuclear reactors essentially identical to Unit 1.

occurrence, "the annual potential radiation exposure of the [within 50-mile] population from all the postulated accidents is an even smaller fraction of the exposure from natural background radiation and, in fact, is well within naturally occuring variations in the natural background." Based on the Commission's study of the affect of postulated accidents within 50 miles, any alleged injury to Petitioner would be virtually nonexistent.[3]

This is consistent with the conclusions of a recent joint NRC/EPA study on nuclear emergency response plans ("Study").[4] Based on the Agencies' evaluation of a full spectrum of postulated accidents and corresponding consequences, an Emergency Planning Zone (EPZ) of approximately 10 miles was selected for the prime exposure pathway and an EPZ radius of about 50 miles was selected for the ingestion exposure pathway. Study at 15-17. Petitioner's geographical position outside the NRC/EPA emergency planning zones again demonstrates that Petitioner is beyond the influence of the Commission's May 16 Order and therefore lives "at such a distance from the

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3 Petitioner did not actually allege any injury. This fact alone should require dismissal of his hearing request in light of the administrative and judicial decisions discussed herein.

4 "Planning Basis for the Development of State and Local Government Radiological Emergency Response Plans in Support of Light Water Nuclear Power Plants : A Report Prepared by a U.S. Nuclear Regulatory and U.S. Environmental Protection Agency Task Force on Emergency Planning," NUREG-0396; EPA 520/1-78-016 (Dec. 1978).

reactor site that, prima facie, there would appear to be no reasonable chance of his being at all adversely affected by either normal operations or a credible accident." Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-183, 7 AEC 222,226 (1974).

This conclusion is especially appropriate because Petitioner has failed to allege any facts in addition to residence and work which might explain how the May 16 Order would affect him. While the Commission and Appeal Boards have declined to "lay down any inflexible standard" with respect to residence as a basis for standing,[5] the cases require that a petitioner's allegations of personal injury increase in specificity the farther away from the plant a petitioner lives and works. Cf. Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1 and 2), LBP-76-10, 3 NRC 209 (1976). For example, in cases where the petitioner has resided between 40 and 100 miles from the facility in question, the Boards have been careful to analyze specific allegations in addition to geographical "proximity" in order to determine the extent of the petitioner's interest and the possible injury to him. Thus, in Tennessee Valley Authority, supra, the Licensing Board examined assertions of eleven different types of interest alleged by petitioner who lived 65 miles away from the plant

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5 See Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 190 (1973).

and concluded that some of them, taken together, made a sufficiently particular case for standing. The crucial allegations were ownership of a second residence only 25 miles from the plant; ownership of other property even closer than 25 miles to the plant; work and shopping between 10 and 40 miles from the plant, and fishing in the lake upon which the plant was situated. Tennessee Valley Authority, supra, at 214-15. Petitioner's allegations are not nearly as specific or proximate as these, and he lives considerably farther from Davis-Besse than the above-mentioned petitioner did from the TVA plant.

Thus, Petitioner's mere allegation of a residence and work area, both nearly one hundred miles from the Davis-Besse site, coupled with a nonspecific allegation that he will be "affected" by a release of radioactivity,[6] do not constitute an allegation of injury to him sufficient to entitle him to a hearing pursuant to the May 16 Order. Cf. Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-536, ___ NRC ___, (filed April 5, 1979);

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6 Petitioner also makes a vague allegation that his workday "often" brings him "closer" than 66 miles, but this allegation should be discounted because (1) Petitioner does not work anywhere near the plant when the legislature is in session in Columbus; (2) Petitioner fails to say how often he is even in Cleveland, much less closer to the plant; and (3) Petitioner does not say how much closer he gets than Cleveland and for how long he remains closer. Cf. Public Service Co. of Oklahoma, et al. (Black Fox Station, Units 1 and 2), ALAB-397, 5 NRC 1143, 1147 n.9 (1977).

Allied-General Nuclear Services, et al. (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420 (1976). Accordingly, Petitioner has no interest which would be affected by the May 16 Order, and he therefore does not meet the "requisite personal interest test" as required by the Commission in its July 5 Order.

B. Petitioner's Position As a State Legislator Does Not Add to his Case for Standing to Request a Hearing.

In his Statement of July 25, Petitioner cites as a key element of his personal interest his official Ohio State Senate duties, which bring him into "direct contact" with the "issue" of Davis-Besse's operation. Petitioner's invocation of his representative status, however, has no bearing on his case for standing to request a hearing.

It is an established principle that a legislator must satisfy the same standing requirements as his constituents; to have standing, a legislator must allege "such a personal stake in the outcome of the controversy as to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial power on his behalf." (Emphasis in the original.) Reuss v. Balles, 584 F.2d 461, 465 (D.C. Cir. 1978), quoting Warth v. Seldin, 422 U.S. 490, 498-99 (1975). Therefore, a legislator may have standing in his official

capacity to challenge acts impairing his ability to function as a legislator, for his personal stake in such a controversy is clear. See, e.g., Coleman v. Miller, 307 U.S. 433 (1939); Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974). When his ability to perform his legislative functions are not at issue, however, a legislator's representative status adds nothing to his required showing of personal interest. See, e.g., Daughtrey v. Carter, 584 F.2d 1050, 1057 (D.C. Cir. 1978); Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977); Harrington v. Schlesinger, 528 F.2d 455 (4th Cir. 1975); Korioth v. Briscoe, 523 F.2d 1271 (5th Cir. 1975).

Petitioner has not alleged that anything in the Commission's May 16 Order will impair his ability to perform his legislative functions. Nor could he. Since the licensing and continued operation of the Davis-Besse plant are within the exclusive jurisdiction of the Commission, Petitioner cannot successfully allege that the performance of any of his legislative functions will be affected. Furthermore, Petitioner cannot achieve standing by claiming to represent constituents with standing if those constituents are not under a legal disability and choose not to request a hearing. See, e.g., Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418-1421 (1977); cf. Crowther v. Seabord, 312 F.Supp. 1205, 1218 (D. Colo. 1970) (state district attorney with no personal stake in controversy does not attain standing to challenge detonation of nuclear device by

purporting to sue on behalf of people of his State). As a result, Petitioner cannot rely upon his representative status to confer standing to request a hearing pursuant to the May 16 Order.

C. Petitioner's Status as a Ratepayer Does Not Add to His Case For Standing to Request a Hearing.

Petitioner's third allegation of personal interest is that, as a consumer of electricity generated at Davis-Besse, he "definitely will have an economic interest in all future operations of the plant." Petitioner's allegation, however, is irrelevant to his case for standing to request a hearing because it is neither within the "zone of interest" to be protected nor sufficiently personal to him.

In Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418 (1977), petitioner sought to intervene in a licensing proceeding by reason of her status as a consumer of TVA-generated power. The Atomic Safety and Licensing Appeal Board affirmed the denial of her petition, stating:

> The Commission has squarely held that status as a ratepayer of an applicant for a nuclear license does not bring one within the "zone of interest" protected by the Atomic Energy Act. ... Portland General Electric Co.

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(Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, NRC I-76/12 610, 614 (1976).

5 NRC at 1420 (footnotes omitted).

See also Kansas Gas and Electric Co., et al. (Wolf Creek Generating Station, Unit No. 1), ALAB-424, 6 NRC 122, 128 n.7 (1977) (noting that a ratepayer's interest is not cognizable in NRC licensing proceedings).

Petitioner's allegation of economic harm not only falls outside the "zone of interest", it also falls far short of the particular, personal harm necessary for standing because Petitioner's complaint as a ratepayer is nothing more than a generalized grievance affecting him no differently than many others. Since such a generalized grievance is normally not cognizable, it should not confer standing in this case. Cf. Tennessee Valley Authority, supra at 1420-21 (concerning an unsuccessful assertion of taxpayer status and quoting Warth v. Seldin, 422 U.S. 490, 499 (1975)).

II. UNDER THE COMMISSION'S JULY 5 ORDER AND IN LIGHT OF PETITIONER'S STATEMENT, THE BOARD SHOULD NOT CONVENE A DISCRETIONARY HEARING.

A. The July 5 Order Removed the Board's Discretion to Convene a Hearing in the Absence of Petitioner's Standing to Request One.

In Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614-617

(1976), the Commission held that licensing boards, using Commission guidelines, may exercise their discretion and grant intervention in licensing proceedings to petitioners not entitled to intervene by right (i.e., petitioners who do not have standing), but who may nevertheless contribute to a proceeding. However, in the instant case, the Commission's July 5 Order obviates the Board's general discretionary power and precludes a hearing for any petitioner without standing to request one by right.

On their face, the Commission's May 16 and July 5 Orders contemplate a hearing only if required by a petitioner who has standing to request one. The May 16 Order provided that:

> ...the licensees or any person whose interest may be affected by this Order, may request a hearing with respect to this Order. (Emphasis added.)

Commission Order of May 16, 1979, at 10.

This was unequivocally confirmed in the July 5 Order:

> A request for a hearing has been received from State Senator Tim McCormack of Ohio.
>
> The Commission hereby directs that the Chairman of the Atomic Safety and Licensing Board Panel shall, pursuant to 10 CFR 2.105(e), select a board to determine whether the requester meets the requisite personal interest test and to conduct any hearing which may be required. (footnote omitted) (emphasis added).

Commission Order of July 5, 1979, at 2.

This language leaves no room for an interpretation that the Licensing Board may convene a hearing if Petitioner fails to meet the requisite personal interest test and the hearing is not therefore required.

The unique facts of this case indicate that the Commission intended, as it clearly stated, to limit any hearing to one which may be required by statute. Licensees here are not applying for a first-time operating license, nor are they seeking to expand or alter substantially the Davis-Besse plant. Rather, the Commission itself initiated the current changes specifically to minimize the possibility and affects of a postulated feedwater transient. An intensive review and analysis by the NRC Staff preceded its decision that Licensees had met the terms and conditions of the Commission's May 16 Order. Under these circumstances, the Commission's July 5 Order gave this Board a limited charter to convene a hearing only if required by virtue of Petitioner's standing. Licensees submit that Petitioner has failed to demonstrate his entitlement (as discussed in Part I, supra) and therefore the Board has no choice but to reject the request for a hearing pursuant to the Commission's May 16 Order.

B. Assuming Board Discretion to Grant a Hearing, Petitioner's Statement is Insufficient to Trigger the Exercise of that Discretion.

Even assuming, arguendo, that the Commission's Orders do not preclude the Board's discretion in this proceeding to grant a hearing to a petitioner without standing, the requisite criteria for invoking a discretionary hearing have not been satisfied. In a very recent decision, an Atomic Safety and Licensing Appeal Board stated that the licensing boards "should be cautious about triggering [operating license] hearings at the behest of those without a statutory right to intervene." Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC _, slip op. at 10 (May 18, 1979). See also Tennessee Valley Authority (Watts Bar Nuclear Power Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1422 (1977). Those cases, as does the instant case, involve operating license hearings which would not otherwise be held in the absence of the petitioners' requests for hearing.

Where a petitioner has not demonstrated standing to intervene to request a hearing, the Boards have enumerated six factors to be considered in deciding whether to allow discretionary intervention. Those factors are:

(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 in the proceeding.

(3) The possible effect of any order which may be entered in the proceeding on the petitioner's interest.

(4) The availability of other means whereby petitioner's interest will be protected.

(5) The extent to which the petitioner's interest will be represented by existing parties.

(6) The extent to which petitioner's participation will inappropriately broaden or delay the proceeding.

Portland General Electric Co., supra, 4 NRC at 616.

Certainly Petitioner has not specified anything in any of his three letters which would enable the Licensing Board to give him favorable consideration under any of the above factors. The Commission's May 16 Order initiated several safety-related changes in plant procedures and equipment. Petitioner gives no indication that the NRC Staff or other interested parties cannot or will not effectively monitor these changes. Petitioner makes no allegations or suggestions that the plant changes or the NRC Staff's review of the changes is in any way deficient or inadequate. Nor does Petitioner allege

any special property or financial interest in the changes initiated at the plant.

Foremost among the considerations governing discretionary hearings is the first of the above factors, i.e., whether the Petitioner's "participation would likely produce a valuable contribution to [the Commission or Board] decision-making process." Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1422 (1977). See also Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-397, 5 NRC 1143, 1151 and n. 14 (1977); Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-363, 4 NRC 631, 633 (1976). Nothing in Petitioner's Statement indicates that he would make a substantial contribution to a discretionary hearing. Petitioner's letters, particularly his May 3 letter, indicate that he is primarily interested in asking questions and seeking a "response" to his "concerns", rather than contributing to a proceeding.[7]

Moreover, nothing in the Statement suggests that Petitioner is qualified by specialized education or pertinent experience to comment on the actions required in the May 16 Order. Nor does the Statement suggest that he will provide

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7 Licensees have no objection to providing Petitioner with information about Davis-Besse's operations. Licensees' objection is to a costly and time-consuming hearing which is neither necessary nor required by law.

expert witness testimony on these matters. Cf. Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-536, ___ NRC ___, (filed April 5, 1979). Indeed, the Statement is one of generalized grievances, strongly suggesting that while a hearing might contribute to his store of information, Petitioner would not provide the public or the Commission with any new safety-related information in the event of a hearing. Clearly, Peitioner's Statement does not meet the Commission's guidelines for discretionary hearings.

CONCLUSION

For the foregoing reasons, Licensees submit that Petitioner lacks standing to request a hearing on continued operation of the Davis-Besse plant, and that the Board cannot and should not grant a discretionary hearing. Therefore, Petitioner's request for a hearing should be denied.

Respectfully submitted,

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Dated: August 8, 1979

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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing "Licensees' Response to Petitioner's Statement of Standing" were served by deposit in the U.S. Mail, first class, postage prepaid, this 8th day of August, 1979, to all those on the attached Service List.

Bruce W. Churchill

Dated: August 8, 1979

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