

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Ivan W. Smith, Chairman  
Dr. Cadet H. Hand, Jr.  
Dr. Walter H. Jordan



SERVED OCT 23 1979

In the Matter of )

THE TOLEDO EDISON COMPANY AND )  
THE CLEVELAND ELECTRIC )  
ILLUMINATING COMPANY )

(Davis-Besse Nuclear Power )  
Station, Unit No. 1 )

Docket No. 50-346  
(Special Proceeding)

MEMORANDUM AND ORDER DENYING REQUEST FOR HEARING  
(October 23, 1979)

By order dated May 16, 1979 the Commission noted that the Davis-Besse Nuclear Power Station, Unit No. 1, is a Babcock and Wilcox designed reactor, as is Three Mile Island Unit 2, and ordered that the Davis-Besse Unit 1 reactor be shut down until certain specified actions were taken. The Commission also provided an opportunity for persons whose interest may be affected by its order to request a hearing with respect thereto. 44 Federal Register 29767, May 22, 1979.

Ohio State Senator Tim McCormack had requested a hearing on the issues by his letter of May 3, 1979 which request he renewed on June 7 after the time set for the filing of such requests.

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By its order dated July 5, 1979 the Commission deemed Senator McCormack's request to be adequate with respect to timeliness. The Commission directed that an Atomic Safety and Licensing Board be selected to determine whether the requester meets the requisite personal interest test of the Commission's intervention rules and to conduct any hearing which may be required. This board was established pursuant to the Commission's July 5 order.

At the board's request, Senator McCormack submitted a letter dated July 25, 1979 explaining his interest. He seasonally spends a substantial amount of his worktime each week in the center of Cleveland which he states is about 66 miles from the facility. He states that often his workday takes him closer than the 66-mile range. He resides in Euclid, Ohio which he states is 11 miles from Cleveland (77 miles from the facility). He is a customer of "... the Davis-Besse product." He states that many of his official duties as an Ohio State Senator bring him "... into direct contact with this issue," but he provided no information concerning the nature of those duties nor how those duties relate to the issues of this proceeding. He also referred to the possibility of being affected by the Davis-Besse reactor because of wind and Lake Erie water flow patterns.

The Licensee and the NRC Staff filed their responses to the petitioner's statement of interest respectively on August 8, and August 13.

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Under 10 CFR §2.714(a)(2) of the Commission intervention rules a petition for leave to intervene:

... shall set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene, with particular reference to the factors in paragraph (d) of this section, and the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene.

Paragraph (d) of §2.714 states:

(d) The Commission, the presiding officer or the atomic safety and licensing board designated to rule on petitions to intervene and/or requests for hearing shall, in ruling on a petition for leave to intervene, consider the following factors, among other things:

(1) The nature of the petitioner's right under the Act to be made a party to the proceeding;

(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.

Status as an electricity rate payer does not meet the interest test of the Commission's intervention rules which are comparable to the tests of standing in judicial proceedings. Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), ALAB-333, 3 NRC 804, 806 (1976). Tennessee Valley Authority (Watts Bar Nuclear Plant, 1 and 2), ALAB-413, 5 NRC 1418 (1977).

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Both the Licensee and the Staff cite a line of authority in their responses concerning a legislator's standing to bring actions or to participate as a party in adjudicatory proceedings. Each argue that Senator McCormack has not demonstrated that his status as a senator confers standing to intervene. The board need not discuss the legal aspects of these arguments, because, as we noted above, the petitioner's statement of interest provides no information whatever as to how his duties with the Ohio Senate would bring him into this proceeding. Thus, on the facts, he has failed to demonstrate interest to intervene as a legislator.

A petitioner's activities such as working and residing within a relevant proximity to a facility may be sufficient to demonstrate that his interests may be affected by the proceeding. Generally the farther from the reactor in question the more the petitioner must specify how his interests may be affected.<sup>1/</sup>

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1/ e.g.

Northern States Power Co. (Prairie Island Nuclear Generator Plant Units 1 and 2) ALAB-107, 6 AEC 188, 190 (1973)  
(residence 30 to 40 miles from facility not too far to require conclusion that petitioners are beyond the zone of interest).

Tennessee Valley Authority, supra, ALAB-413 at 1421  
(students' residence 50 miles from facility not too far to preclude finding of standing).

Dairyland Power Cooperative (LaCrosse Boiling Water Reactor) ALAB-497, 8 NRC 312 (1978). (Petitioner residing 75 miles from facility alleging general safety contentions was beyond the geographical zone of interest).

Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2) ALAB-522, 9 NRC 54 (1979).  
(Petitioner residing 45 miles from facility and who canoes on nearby North Anna River not obviously unaffected).

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This consideration gives rise to some factual confusion. Senator McCormack states he resides 77 miles away, and regularly works 66 miles away, often closer. Licensee states that the center of Cleveland and the petitioner's residence are 73 and 84 air miles respectively from Davis-Besse.<sup>2/</sup> Licensee's Response, p. 5. Staff states that if the 66-mile figure is correct he would be within an area close enough to grant standing within the rationale of the North Anna case, supra, n. 1., but that distances of 86 miles and more would be too far.

The Davis-Besse station is 21 miles east of Toledo. FES 1-1. According to the Rand McNally road map, we compute this location to be about 74 air-miles from the center of Cleveland, so we accept licensee's statement that the distance is 73 miles.

The board rules that the petitioner's working activities 73 miles from the facility and his residence 84 miles away are too distant to establish the requisite personal interest in the proceeding without additional showing of connection to issues. We disagree with the Staff's position that the North Anna decision would support a conclusion that working activities 66 miles from the facility would in this instance establish Senator McCormack's personal interest. Even if the 66 miles were accepted, our ruling would remain unchanged.

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<sup>2/</sup> We have disregarded licensee's larger estimate of highway mileage as irrelevant.

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The staff suggested that confusion concerning the distances and the petitioner's allegation that he works even closer than the asserted 66 miles would warrant further submissions on these issues. Staff's response, p. 7. Because of the lack of specificity concerning these activities, and the void of information concerning the petitioner's duties as a legislator, we provided him with an opportunity until September 7 to address the respective responses of the Licensee and Staff in our memorandum and order of August 20. Senator McCormack filed nothing in response to the board's invitation. The board noted the petitioner's silence and other circumstances which seem to indicate that he may have lost interest in the proceeding. Therefore, in a memorandum and order of October 1, we notified Senator McCormack that his statement of interest was inadequate to demonstrate his standing to intervene and that we would so rule unless he supplemented his statement. We also directed him to:

inform the board on or before October 10, 1979 whether or not he wishes to have a hearing in this proceeding, whether he intends to participate in any such hearing, and if so, to what extent and concerning which subject matters. In the absence of a response from Senator McCormack, we will conclude that his request for a hearing has been abandoned.

Senator McCormack has not responded to the board's order of October 1, 1979.

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Ruling and Order

1. The petitioner, Ohio State Senator Tim McCormack, has not met the personal interest tests of the Commission's intervention rules, 10 CFR §2.714(a)(2) and (d) and has no standing to intervene.

2. The petitioner has abandoned his request for a hearing.

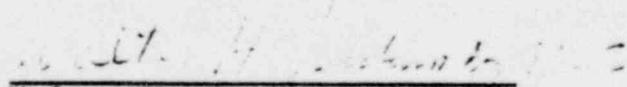
3. The petitioner's request for a hearing is denied.

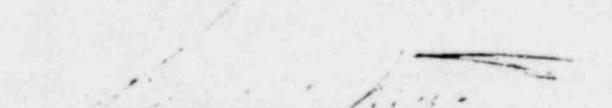
4. There being no other petitioner, no hearing is required pursuant to the Commission's memorandum and order of July 5, 1979.

5. Pursuant to 10 CFR §2.714a this order may be appealed to the Atomic Safety and Licensing Appeal Board within 10 days after service.

Dr. Cadet Hand did not participate in the preparation of this memorandum and order, but he agrees with its conclusions.

ATOMIC SAFETY AND LICENSING BOARD

  
Walter H. Jordan

  
Ivan W. Smith, Chairman

Dated at Bethesda, Maryland  
this 23rd day of October, 1979.

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