

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE
ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of)	Docket Nos. 50-338
)	50-339
VIRGINIA ELECTRIC AND POWER COMPANY)	
)	(Proposed Amendment
(North Anna Nuclear Power)	to Operating License
Station, Units 1 & 2))	NPF-4)

Brief in Support of Appeal

On December 8, 1978, the Atomic Safety and Licensing Board ("the Board") issued an "Order and Recommendation On Petitions For Leave To Intervene" in the above-captioned proceeding conveying its decision to deny the Potomac Alliance's ("the Alliance's") petition to intervene. On December 19, 1978, the Board issued an "Amended Order and Recommendation on Petitions for Leave to Intervene" ("Amended Order") which differed from the former order in form but not result. The amended order stated that "[t]his amended order and recommendation replaces the original order and recommendation filed December 8, 1978." Amended Order at 1. Therefore, this brief and the accompanying notice of appeal relate only to the Amended Order of December 19, 1978.

The decision of the Board was based on the three written filings submitted by the Alliance as described in paragraph 4 of the Amended Order at p. 2. In addition, the Board

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apparently considered the testimony of a representative of the Alliance at a special pre-hearing conference held on September 8, 1978 in Charlottesville, Va. This testimony is quoted in the Amended Order at p. 5, and apparently was fully considered and relied upon by the Board in reaching its decision. See Amended Order at p. 4. This appears consistent with the authority of the Board and the purposes of the special pre-hearing conference as described in 10 CFR 2.751a.

The Board offered three grounds in support of its denial of the Alliance's petition: that the "Alliance's petition, including its motion to supplement amended petitions...with accompanying affidavits:"

- (1) "failed to describe any adequate interest with sufficient particularity;"
- (2) failed to satisfactorily describe "how an acceptable interest might be affected by the results of the proceeding;" and
- (3) "did not give satisfactory attention to the limited subject matter" of the proceeding.

Amended Order at p. 13. The Alliance asserts that each of these conclusions is in error and asks that the decision be reversed in its entirety. Each of the three issues will be addressed separately.

I. The Alliance Described with Sufficient Particularity
the Interests of its Members which Stood to be Affected
by the Proceeding.

The Alliance stated repeatedly and in detail that it was seeking intervention in the proceeding to protect its members' interests in their health and safety, and in the maintenance of the integrity of the environment insofar as it affects them personally. Among the many ways and times at which these interests were described are the following:

"The proposed [amendment to VEPCO's operating license] would increase the low-level radiation exposure for people around the North Anna and Northern Virginia areas...resulting in numerous health hazards, causing premature death and cancer."

[Original] Petition for Leave to Intervene at p. 4.

"The Alliance's principal concern of relevance to this proceeding is the potential health, safety, and environmental problems associated with storage and possible releases of radioactive materials as a result of the applicant's proposed modification of its spent fuel storage pool..."

Amended Petition at p. 1.

"The North Anna proposal subjects the Petitioners and others to potential health, safety, and environmental dangers..."

Amended Petition at p. 2.

"The interests of our members in this proceeding are both in their property and their health and safety and in the general quality of their environment."

Statement of the representative of the Potomac Alliance, Tr.

at p. 44. See also Tr. at pp. 44-46.

The above described interests are indisputably within the zones of interest sought to be safeguarded by the Atomic Energy Act, 42 U.S.C. §§ 2011-2282, and the National Environmental Policy Act, 42 U.S.C. §§ 4321-4361. As was pointed out by the Staff, Staff Response to Motion to Supplement Amended Petition for Leave to Intervene at pp. 3-4, these allegations asserted statutorily-protected interests in the proceeding sufficient to support standing to intervene. The Board's conclusion to the contrary is puzzling and erroneous, and the Alliance asks that it be reversed.

II. The Alliance Described with Sufficient
Particularity the Manner in Which the
Interests of Its Members Stood to be
Affected by the Proceeding.

As will be discussed below, the requirement in 10 C.F.R. §§ 2.714(a)(2) that petitions for intervention "set forth with particularity...how [the petitioner's] interest may be affected" is one which has been loosely interpreted. The Board's strict application of this requirement is a departure from precedent which, if affirmed by this Appeal Board, may have serious implications beyond the context of this proceeding.

Under judicial rules of standing, which apply to proceedings before the Nuclear Regulatory Commission (NRC), Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4NRC 610 (1976), a claim that a proposed administrative action will injure the legally protected interests of a petitioner will not be deemed insufficient to support standing solely because the alleged chain of injurious events is extremely attenuated, or cannot be fully proven prior to an evidentiary hearing. SCRAP v. United States, 412 U.S. 669 (1973). See also Duke Power Co. v. Carolina Environmental Study Group, Inc., ___ U.S. ___, 46 U.S.L.W. 4845 (1978). That licensing boards should demand only a general description of the way in which the issuance of a license would affect the prospective intervenor is intuitively plausible, given the technical nature

of the issues, and is supported by NRC precedent. Gulf States Utilities Co. (River Bend Sta., Units 1 and 2), ALAB-444, 6 NRC 760 (1977). A brief description of the kinds of pleadings which either the Commission or the Atomic Safety and Licensing Appeal Board (Appeal Board) have found sufficiently specific to support standing demonstrates that the presentations of the Alliance in the present matter more than adequately explained how its members' interests would be affected by the proposed amendment to VEPCO's operating license.

In Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3) CLI-73-10, 6 AEC 173 (1973), petitioners alleged that they lived sufficiently close to a pond slated to receive cooling waters from a proposed plant to make use of its recreational potential, evidently without alleging that they actually used or would use the pond. Nevertheless, the Atomic Energy Commission found that, when "read fairly," the pleadings revealed a personal interest in the outcome of the proceeding, as well as

"how that interest may be adversely affected (creation of allegedly unwanted thermal pollution may diminish or eliminate the pond's recreational capability)."

See also Mississippi Power and Light Co. (Grand Gulf Nuclear Sta., Units 1 and 2) ALAB-130, 6 AEC 423 (1973).

In Duke Power Co. (Catawba Nuclear Sta., Units 1 & 2) ALAB-355, 4 NRC 397 (1976), the Appeal Board found that

because some of one petitioner's members lived within the vicinity of the plant and used for recreational purposes the pond to be inundated with cooling water, it was sufficiently evident that because the plant would contaminate the air and water, it would adversely affect them.

In Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Sta.) ALAB-328, 3 NRC 420 (1975), an organizational petitioner which operated a health food restaurant alleged simply that the transportation of radioactive materials to and from the subject facility threatened cropland on which food sold in the restaurant was grown. The cropland in question was not limited to that in the vicinity of the facility, but included land in other parts of the state. The Appeal Board affirmed the Licensing Board's conclusion that this allegation described with sufficient specificity how the petitioner's interests stood to be affected by the proceeding.

The Alliance has attempted, within the limits of its technological expertise, to identify with precision the hazard posed by the proposed spent fuel pool modification and to sketch out every link in the causal chain connecting the proposed modification with the interests of its members. At the special prehearing conference on September 8, 1978 the Alliance's representative alleged that the proposed modification would directly result in increased emissions

of thermal and radioactive pollution. Tr. at pp. 50-51. The latter danger was also addressed in par. 16 of the Amended Petition at p. 5.

The Alliance devoted considerably more attention to a less direct but perhaps more dangerous source of pollution: the likelihood that the addition of extra spent fuel would adversely affect the pool itself, its components, and particularly the stored fuel assemblies, and thus result in unforeseen releases of heat and radiation. Amended Petition par. 21, p. 7; par. 30, p. 13; par. 31, p. 14; Tr. at pp. 51-52. At these times the Alliance alleged that the increased thermal and radiological stress on all of the items would accelerate the inevitable processes of decay and corrosion, and in the near term lead to increased and unanticipated releases of dangerous contaminants as the integrity of the pool and its components fall below acceptable levels.

Furthermore, the Alliance pointedly addressed the ways in which such emissions would ultimately reach its members and adversely affect their protected interests. It was alleged that such emissions might be released into the atmosphere. Amended Petition at p. 2. Affidavit of Elizabeth H. Lonnes. It was further alleged that air which was thus contaminated would be carried by the prevailing winds into contact with members and their families. [Original] Petition

at p. 1; Affidavit of Elizabeth H. Lonnes. It was further alleged that even if such contaminants would not be conveyed to them, the members and their families frequently come to Lake Anna for recreational purposes and would thus come into contact with and inhale contaminated air. Tr. at p. 45.

The Alliance also asserted that the modification of the spent fuel pool would result in increased discharges of thermal and radioactive pollution into nearby waters. Tr. at pp. 50, 52 (referring to thermal emissions); Affidavit of Elizabeth H. Lonnes (referring to radiological releases into the North Anna River and Chesapeake Bay). Implicit in the allegation that members use Lake Anna and the North Anna River was the allegation of a possibility of personal, physical contact with contaminated waters.

In addition to the above, an entirely separate causal chain was proposed. Specifically, it was alleged that radioactive emissions into nearby bodies of water, as well as into the air, would be introduced into the food chain. Such pollutants, it was alleged, would be assimilated by agricultural crops in the region and passed on the members of the petitioner who eat locally grown foods. Tr. at p. 45; Amended Petition at par. 16(a), p. 5. The Alliance further contended that these pollutants would be ingested by fish and seafood downriver from the plant, and ultimately by

members of the petitioner. Affidavit of Elizabeth H. Lonnes.

Thus, the submissions of the Alliance described with particularity the dangers posed by the proposed license amendment, and painted a very clear picture of the specific pathways through which those dangers would be transmitted to its members, thereby adversely affecting their protected interests.

Finally, it should be pointed out that the Board was aware or should have been aware that the Alliance was proceeding on a pro se basis. No notice of appearance had been filed by a legal representative, and on the one occasion on which an attorney spoke on the Alliance's behalf due to emergency circumstances, his remarks were explicitly offered as a member of the organization and not as counsel. Tr. at p. 10. With the exception of this Brief and the accompanying Notice of Appeal, none of the materials submitted by the Alliance were prepared by an attorney. It is well established that pro se petitions are to be held to a lesser standard of precision and clarity than those prepared by counsel. Public Service Electric and Gas Co. (Salem Nuclear Generating Sta., Units 1 & 2) ALAB-136, 6 AEC 487 (1973). Thus, if the Board found insubstantial or technical defects in the pleadings, it was obligated to reasonably infer from them the intended meaning. The Board's Amended Order gave no indication that it was aware of this obligation.

III. The Alliance's Submissions Satisfactorily
 Addressed the Limited Subject Matter of the
 Proceeding.

In paragraph 37 of its Amended Order the Board stated that the Alliance had not given "satisfactory attention to the limited subject matter of the proposed amendment to VEPCO's operating license, that is, the expansion of the spent fuel capacity." Amended Order at p. 13. The Alliance assumes that this somewhat ambiguous statement was not meant to express the Board's determination that the Alliance had failed to identify the particular aspects of the proceeding as to which intervention was sought, as required by 10 CFR 2.714. Indeed, the staff's position is that several of the Alliance's contentions were adequate in that respect, Staff Response to [Original] Petition at p. 9, and the Virginia Electric and Power Company (VEPCO) offered no objection to several of the contentions raised in the Amended Petition. VEPCO's Answer to Amended Petition at pp. 14-19. Rather, the Board's statement appears to embody its concern, as echoed elsewhere in its Amended Order, that the Alliance's submissions and testimony were addressed not at the dangers posed by the proposed modification of the spent fuel pool specifically, but at the dangers posed by the North Anna station or the nuclear industry generally.

Admittedly, at several places the Alliance's submissions discussed generalized issues outside the jurisdiction of the Board. Certainly, however, such departures from the legal concept of relevance are understandable and can be tolerated from participants appearing pro se. It is harder to understand how the Board could have interpreted such statements to imply that the Alliance was not directly concerned with the narrow question of the impacts of the spent fuel pool modification.

While it seems unnecessary to list the many points at which the Alliance's narrow focus was evident, it is helpful to look just at those statements by the Alliance which were subsequently quoted by the Board in its Amended Order:

"The Alliance's principal concern of relevance to this proceeding is with the potential health, safety and environmental problems associated with the storage and possible releases of radioactive materials as a result of the applicant's proposed modification of its spent fuel storage pool...

Amended Order at p. 3, quoting from Amended Petition at p. 1.
(emphasis supplied).

"obviously the plant had [sic] been adjudicated to be safe within margins. There is certainly a risk, but that risk has been found to be reasonable, and we don't want to raise that at this point.

We do think, though, that they [VEPCO] are undertaking additional risks in this process..."

Amended Order at p. 5, quoting from Tr. at p. 48.
(emphasis supplied). See also Amended Order at p. 7,
quoting from Affidavit of Eliazbeth H. Lonnes; Amended
Order at p. 5, par. 12, quoting from Tr. at p. 47.

Aside from the Alliance's statements of interest,
it is more than clear from the substance of its conten-
tions that it was concerned specifically with the
"marginal risk" created only as a result of the pro-
posed modification. See, e.g., Amended Petition at
par. 10, p. 3; par. 13, p. 4; par. 15, p.5; par. 16,
p. 5; par. 18, p. 6, par. 30, p. 13.

Furthermore, one member of the Board directly
challenged the Alliance's representative on whether the
organization intended to raise generic issues or to con-
fine its participation to the narrow issues at hand. The
response was direct and unequivocal:

"we recognize that there are limitations on
the scope of the proceeding under the reg-
ulations, and our intent is not to try to
exceed those here."

Tr. at 49. The Alliance has no intention and probably no
power to pursue extraneous issues in this proceeding, and
it so stated to the Board in no uncertain terms. The
Board's ruling on this question is therefore unsupportable
and should be reversed.

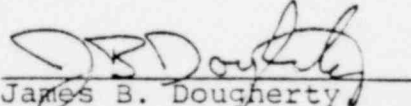
IV. Conclusion

The Atomic Energy Act provides that "the Commission shall grant a hearing upon the request of any person whose interest may be affected" by a licensing proceeding. 42 U.S.C. § 2239(a). There is of course no question that in addition to requiring a showing of an affected interest, the Commission may further require a prospective intervenor to show how that interest may be affected. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2) ALAB-107, 6 AEC 188 (1973). Where, however, a crabbed application of this extra requirement is used to defeat the standing of a petitioner whose interest may be affected, despite the intervenor's earnest and repeated attempts to fully delineate an essentially obvious causal nexus, the effect is to subvert the key statutory purpose of affording those affected by the Commission's actions an opportunity to be heard. Intervention by affected parties is not only statutorily mandated, but has been acknowledged as a valuable and otherwise unavailable source of input into the decision of licensing bodies. Consolidated Edison of New York, Inc., (Indian Point Station, Unit No. 2), ALAB-243, 8 AEC 850, 853 (1974); Gulf States Utilities Co., (River Bend Sta., Units 1 & 2) ALAB-183, 7 AEC 222, 227-8 (1974).

In denying the Alliance's petition to intervene, the Board appeared to ignore or misconstrue material segments of the Alliance's submissions and testimony, and to misapply the appropriate legal principles to much of what it chose to consider. The Board's determination conflicted with the opinion of the staff, and errs beyond the bounds of any discretion to which it may be entitled in the conduct of its proceedings. The Alliance respectfully requests the Appeal Board to reverse the decision and to order the Licensing Board to admit the Alliance as intervenors.

This appeal and supporting brief have deliberately addressed only those issues which ostensibly formed the basis of the Board's Amended Order. The Alliance seeks to reserve the privilege to pursue any issues previously raised, notwithstanding the failure to raise such issues in this appeal.

Respectfully submitted,


James B. Dougherty
Counsel for the Potomac Alliance

Dated at Washington, D.C. this
3d day of January, 1979.

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NOTICE OF APPEARANCE

Notice is hereby given that James B. Dougherty enters an appearance as counsel for the Potomac Alliance in the above-captioned matter. The following information is provided pursuant to 10 C.F.R. § 2.713(a).

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James B. Dougherty

Dated at Washington, D.C.
this 3d day of January, 1979.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Appeal, the accompanying Brief in Support of Appeal, and Notice of Appearance for James B. Dougherty were mailed this 3rd day of January, 1979, by United States Mail, First Class, to the following:


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