

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

12/12/79

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
COMMONWEALTH EDISON COMPANY, et al.) Docket Nos. S50-599
(Carroll County Site)) S50-600

NRC STAFF RESPONSE TO CITIZENS AGAINST NUCLEAR
POWER, INC. "MOTION FOR LEAVE TO FILE SECOND
AMENDED PETITION" AND "SECOND AMENDED
PETITION FOR LEAVE TO INTERVENE"

On November 23, 1979, Petitioners Citizens Against Nuclear Power, Inc., James Runyon and Edward Gogol (hereinafter Petitioners) moved the Licensing Board for leave to file a second amended petition for leave to intervene, containing four newly proposed contentions. For the reasons set forth below, the NRC Staff opposes such second amended petition.

Petitioners' memorandum in support of their amended petition recites the five factors to be considered in evaluating untimely petitions, set forth in 10 C.F.R. §2.714(a)(1), and attempts to demonstrate the satisfaction of those five factors by the instant petition. NRC Staff would submit, first, that a

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balancing of the five factors,^{1/} based on the discussion of CANP's proposed contentions, infra, would logically lead to a denial of the petition. Staff would further submit that a more stringent test, not alluded to by Petitioners, governs an amendment of a petition to intervene which has the effect of expanding the scope of the original petition, as opposed to the untimely filing of an initial petition.

The appropriate test, set forth in Waterford,^{2/} places upon an intervenor seeking to expand the scope of a previously filed intervention petition the

1/ 10 C.F.R. §2.714(a)(1) reads, in pertinent part, as follows:

Nontimely filings will not be entertained absent a determination by the Commission, the presiding officer or the atomic safety and licensing board designated to rule on the petition and/or the request, that the petition and/or request should be granted based upon a balancing of the following factors in addition to those set out in paragraph (d) of this section:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

2/ Louisiana Power and Light Company (Waterford Steam Electric Station, Unit 3) LPB-73-31, 6 AEC 717, appeal dismissed as interlocutory, ALAB-168, 6 AEC 1155 (1973).

burden of persuading the Licensing Board that the information upon which the additional contentions are based: (a) was objectively unavailable at the time the original petition was filed; and (b) had it been available, the petition's scope would have been broader. There is nothing in the memorandum furnished by Petitioners from which it might be inferred that the information upon which Proposed Contentions 16 through 19^{3/} are based was unavailable at the time of the initial petition. In fact, other admitted intervenors in this case have submitted tentatively admitted contentions raising each of the issues which are the subjects of Petitioners' newly proposed contentions.

Petitioners' Proposed Contention 16, dealing with the Plum River fault, is substantially less detailed than four tentatively admitted contentions in this proceeding. State of Illinois Contention 5,^{4/} Jo Daviess County Ad Hoc Committee

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- 3/ 16. Applicants have failed to adequately show that the Plum River fault is not a capable fault in determining site geologic suitability.
17. Applicants have failed to adequately show that the proximity of the proposed site to the Stansky Airport does not pose an undue danger to the public's health and safety in the event of an aircraft accident.
18. Applicants have failed to adequately show that the proximity of the proposed site to the Savanna Army Depot does not pose an undue danger to the public's health and safety in the event of an attack or accident on or involving said Depot.
19. Applicants have failed to adequately show that there exist adequate medical facilities or personnel in reasonable proximity of the proposed site in the event of an accidental offsite discharge of radiation.
- 4/ Applicants have failed to adequately show that the Plum River fault, which runs within 5.5 miles of the site, is not a capable fault in determining site geologic suitability and necessary safety measures for the proposed reactors.

on Nuclear Energy Information (hereinafter Jo Daviess) Contention II,^{5/}
Iowa Public Interest Group, Inc. Contention 1,^{6/} and Iowa Socialist Party Con-
tention 1(a)(ii).^{7/}

Petitioners' Proposed Contention 17, dealing with the proximity of the proposed site to Stansky Memorial Airfield, is substantially less specific than State

5/ This Site, and Applicant's Byron Station Site, are uniquely located in that each lies within six miles of the Plum River Fault which originates in Southern Wisconsin, extends southwesterly through Northern Illinois, crosses the Mississippi River at a location within five miles of this Site, and terminates near Maquoketa, Iowa. In regard to this extensive geologic formation, Applicant has not sufficiently examined, researched, and considered the following matters, as required by the NEPA, the EQIA, and 10 CFR Part 51:

- (a) The insufficiency of data regarding potential engineering, safety, and geologic difficulties resulting from a possible shifting of the Plum River Fault.
- (b) The insufficiency of data regarding such difficulties resulting from seismic activity related to such Fault.

6/ The Applicants have not demonstrated, in their Site Safety Report, that the Plum River Fault Zone is not a capable fault within the definition used in 10 CFR Part 100, Appendix A, in that no proof is available beyond a period including the last 200,000 years that there has been no recurring activity within the last 500,000 years.

7/ In their Site Safety Report, the applicants have not demonstrated all the safety and environmental aspects of the site have been adequately met under the requirements of 10 CFR and the National Environmental Policy Act, in that:

- a. adverse effects on land use patterns in the area have not all been fully considered and detailed, such as,
 - (ii) failure to adequately consider geological characteristics of the area such as the Plum River Fault.

of Illinois Contention 7^{8/} or Jo Daviess Contention IV(c).^{9/} Petitioners' Proposed Contention 18, dealing with the proximity of the site to overt military targets, including the Savannah Ordnance Depot, is virtually identical to Jo Daviess Contention IV(b).^{10/} None of these newly proposed contentions in any way further develops the issues which are already before this Licensing Board by virtue of tentatively admitted contentions of other parties admitted as intervenors.

8/ Applicants have failed to establish that operation of the proposed station 2.3 miles from Stansky Airport does not present an undue risk to the public's health and safety. Specifically, there is insufficient data to assess the risk that an aircraft might crash into the station and environmental and safety consequences of radiological releases from the plant resulting from such an incident.

9/ As with all locales for which a nuclear power plant site is proposed, the Jo Daviess - Carroll Counties present a vast number of unusual social and demographic qualities for our concern. In these regards, Applicant has not sufficiently examined, researched, and considered the following matters, as required by the NEPA, the EQIA, and 10 CFR Parts 50 and 51:

* * *

- (b) The proximity of said Site to overt military targets, namely the Savannah Ordnance Depot which lies seven miles to the Northwest of the Site, and the Savannah railroad yards which lie three miles to the Northwest of the Site.
- (c) The proximity of said Site to Carroll County's major airport, namely Stansky Memorial Field which lies two miles to the Northwest of the Site, and the incumbent difficulties therein concerning lines of approach and departure and local operations.

10/ Ibid.

1616 184

CANP Proposed Contention 19 reads as follows:

Applicants have failed to adequately show that there exist adequate medical facilities or personnel in reasonable proximity of the proposed site in the event of an accidental offsite discharge of radiation.

This contention presents an issue which is not covered by any of the tentatively admitted contentions of other parties. However, the availability of medical treatment facilities is a topic which the NRC Staff contends is not ripe for adjudication at the early site review stage, as it has no bearing upon the suitability of the Carroll County site as adequate to support the construction and operation of a nuclear generating facility. Rather, it is an issue which will be considered by the Staff in the second phase of the construction permit proceeding, and objections would not lie to consideration of otherwise admissible contentions dealing with this subject at that time.^{11/}

Turning now to the five factors of §2.714(a)(1), NRC Staff contends that the balancing test prescribed here tilts against admission of the newly proposed contentions. As to the first factor, good cause for failure to file on time, Petitioners cite the inexperience of counsel and their misdirected emphasis on contentions which were mooted when Applicant subsequently withdrew certain of its proposed findings. Concededly, some leeway might be extended Petitioners on this point, in the case of an initial petition for leave to intervene; however, as discussed above, it is submitted that an amended petition, seeking to add newly developed contentions, must be evaluated under the

^{11/} This Licensing Board has held in abeyance three analogous contentions "pending the publishing of the Three Mile Island NRC Staff report or further Commission action." Included therein is Petitioners' Contention 15. Memorandum of Special Prehearing Conference and Order, October 10, 1979, at pp. 12-13.

standard set forth in Waterford. In any event, however, the self-described inexperience of counsel,^{12/} which may or may not constitute "good cause," is not in itself reason to grant Petitioners' motion to amend.

As to the second factor, "availability of other means whereby the petitioner's interest will be represented by existing parties," it is apparent that each of the issues raised in Petitioners' Proposed Contentions 16 through 18 has been raised in substantially greater detail by other admitted intervenors, including the State of Illinois' Office of the Attorney General. Petitioner, however, asserts that the State "cannot represent the private interests of these petitioners nor conduct the educational activities carried out by the same." The Staff would only note that Petitioners allege no unique personal, proprietary, or financial interests not common to other Illinois residents whose interests might be affected by construction or operation of a nuclear generating station at the proposed Carroll County site. As to "educational activities," which are not further defined, presumably Petitioner is referring to matters outside the hearing process.

As to the third factor, "the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record," no particular expertise of the organizational or individual petitioners is alleged

^{12/} This alleged inexperience apparently was not an all-pervasive handicap of Petitioners' counsel which was recognized by the Licensing Board. See Special Prehearing Conference Tr. 50, September 19, 1979.

in their motion.^{13/} Moreover, Petitioners assert in their Memorandum that "[they] will expend their resources on issues where applicants' findings and conclusions are considered to be questionable (i.e., withdrawn proposed finding 8) or contrary to their interests." Clearly, no showing has been made to warrant a conclusion that the record will be improved by consideration of matters outside the scope of the proceeding.

Last to be considered is the fifth factor, "the extent to which petitioner's participation will broaden the issues or delay the proceeding." It is not apparent that the newly proposed contentions would serve to broaden the issues already before the Licensing Board. As to delay, little purpose would be served, and some delay at hearing would be occasioned, by admission of yet another party for purpose of adducing testimony and conducting cross-examination of witnesses.

Accordingly, the Staff submits that the application of the "five factors" test is similarly dispositive of Petitioners' motion to amend, and that the motions should be denied.

In the instant case, unlike the situation where failure to allow the admission of an untimely petition to intervene might preclude an evidentiary hearing on issues of substantial importance, it is apparent from the record that

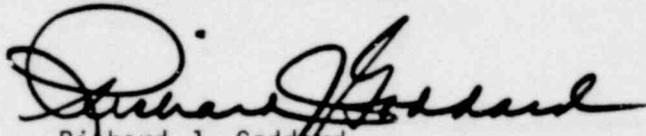
^{13/} Petitioner Gogel's personal qualifications were presented to the Licensing Board on the question of his individual intervention, despite his residence 140 miles from the proposed site. Special Prehearing Conference Tr. 14-16, September 19, 1979. Having taken the question under advisement (Tr. 16), the Board subsequently ruled against him for lack of standing. Memorandum of Special Prehearing Conference and Order, October 10, 1979, at 2.

Petitioners merely seek a foothold in the proceeding by submitting otherwise acceptable contentions after the initial time for filing their petition had elapsed. If, in fact, Petitioners' newly proposed contentions were admitted in this proceeding, the Staff would immediately move for consolidation of Petitioners with other intervenors who had successfully raised contentions involving these issues. It is not apparent that any purpose will be served by admitting these contentions at this time. If, in fact, Petitioners possess the knowledge, resources, and willingness to develop the record on these issues, there is nothing to prevent them from informally offering assistance to admitted intervenors in the proceeding.

CONCLUSION

For the reasons set forth above, NRC Staff opposes Petitioners' Motion for Leave to File a Second Amended Petition to Intervene, and the admission of Petitioners' Proposed Contentions 16 through 19 as matters in controversy.

Respectfully submitted,



Richard J. Goddard
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 12th day of December, 1979.

1616 188

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO CITIZENS AGAINST NUCLEAR POWER, INC. "MOTION FOR LEAVE TO FILE SECOND AMENDED PETITION" AND "SECOND AMENDED PETITION FOR LEAVE TO INTERVENE" 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 12th day of December, 1979.

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1616 189

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1616 190