

Zediker, Carole Zediker, Dianne Frothingham and the Bailly Alliance-Illinois ("Bailly Alliance").^{1/} Some of the Petitions purportedly filed on behalf of identified organizations fail to establish the standing of said organizations to participate in this proceeding. All of the Petitions attempt to raise matters which are not proper subjects for adjudication in the context of an operating license proceeding. However, each of the Petitions appears to meet the minimum requirements of 10 CFR §2.714(a)(1) and (2) with respect to at least one identified Petitioner.

Argument

The Petitions Fail to Establish That the League of Women Voters, DAARE, SAFE Or the Bailly Alliance Have Standing to Intervene.

10 CFR §2.714(a)(2) requires that a petition to intervene set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding (with particular reference to the three factors listed in 10 CFR §2.714(d)) and the specific aspect or aspects of the proceeding as to which the petitioner wishes to intervene. The Commission has ruled that in determining whether a petitioner has an interest which may be affected within the meaning of Section 189 of the Atomic Energy Act and 10 CFR §2.714(a) sufficient to confer standing to intervene in an NRC licensing

^{1/} Those persons who have filed Petitions to Intervene will, at times, be collectively referred to as "Petitioners."

proceeding, the Atomic Safety and Licensing Boards assigned to rule on petitions should apply contemporaneous judicial concepts of standing. Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976). In reliance on the decisions in Sierra Club v. Morton, 405 U.S. 727 (1972) and Warth v. Seldin, 422 U.S. 490 (1975), the Commission determined that to have standing, a petitioner must satisfy a two-pronged test: 1) he must adequately allege that he has or probably will suffer some injury from the action involved (the "injury in fact" test); and 2) he must allege an interest which is arguably within the zone of interest sought to be protected under the Atomic Energy Act. Id., pp. 613-14.

Under the "injury in fact" test, standing to intervene is conferred upon an organization only when it can show an injury to itself or to its members. Warth v. Seldin, supra; Nuclear Engineering Company, Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 742 (1978). Standing must be denied the organization if it merely alleges, without more, a general interest in the problem. Allied-General Nuclear Services, et al. (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420 (1976). If standing is asserted on the ground that members of the organization will be adversely affected by the action, Applicant and the Licensing Board are entitled to a showing concerning the identity of those members so as to permit an independent factual determination of the asserted

injury. "Memorandum and Order" issued by the Licensing Board in Consumers Power Company (Midland Plant, Units 1 and 2), dated August 14, 1978. Furthermore, there must be a showing that those members have authorized the organization to represent their interests, to satisfy the basic legal principle that one party may not represent another without express authority to do so. See: Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-77-11, 5 NRC 481, 483 (1977) and cases cited therein. If an individual asserts that he is representing an organization, he must show that the organization has expressly authorized such representation because, under 10 CFR §2.714(a), he must allege sufficient facts to show that the Petitioner has standing. See also: Portland General Electric Co., supra. The Petitions of the League of Women Voters, DAARE and SAFE, and the Bailly Alliance fail to establish that the organization or its membership have an adequate interest in the proceeding, fail to establish that any of the identified organizations have been authorized by its membership to represent the interest, if any, of its membership in this proceeding and fail to establish that the person signing the Petition is authorized to represent the organization. As is shown below, the Petitions of the League, DAARE, SAFE and Bailly Alliance must be denied to the extent that they purport to be Petitions on behalf of identified organizations.

A. League of Women Voters.

The Petition to Intervene purportedly filed on behalf of the League of Women Voters and signed by Ms. Betty Johnson totally fails to demonstrate that the League has duly authorized Ms. Johnson to represent its interest or that of its members in this proceeding. As such, it is impossible for Applicant or the Licensing Board to determine whether: (1) the League desires to intervene in this proceeding; and (2) if so, whether the League desires Ms. Johnson to serve as its standard bearer in this matter. Therefore, the Petition of the League must be denied.^{2/}

B. DAARE and SAFE.

The Petition purportedly filed on behalf of DAARE and SAFE totally fails to establish the standing of either of these organizations or of any individual member thereof. Although the Petition is signed by Marilyn J. Shineflug, whose mailing address is given as "DAARE, P.O. Box 261, DeKalb, Ill. 60115," nowhere is it alleged that Ms. Shineflug is a member of either DAARE or SAFE, nor has the residence of Ms. Shineflug been identified. Thus, it is impossible to know whether any of the members, or indeed Ms. Shineflug, will be adversely affected by the proposed action so as to gain standing to participate as parties to this pro-

^{2/} If the Board is so inclined, it might care to evaluate the Petition of the League as the individual petition of Ms. Johnson. Based on the residence given for Ms. Johnson, it appears that she lives within sufficient proximity to the Byron Station to demonstrate her personal interest in the proceeding.

ceeding. Moreover, Ms. Shineflug has not demonstrated that the members of either organization have requested or consented to her representation of their interests in this proceeding. For these reasons, the Petition must be denied.

C. Bailly Alliance.

The Bailly Alliance Petition is purportedly submitted on behalf of that organization, as well as various named individuals. To the extent that the Petition is asserted to have been submitted on behalf of the Bailly Alliance or its members, again, there has been no showing that Ms. Rorem has been duly authorized to represent the interests of the organization, or those of its members, in this proceeding. Therefore, one cannot know whether Ms. Rorem is attempting to assert rights of others without their knowledge or consent. As such, to the extent that this Petition requests that the organization be permitted to intervene, it must be denied. However, each of the individuals signing the Petition have stated that they reside within sufficient proximity to the Braidwood Station to establish their individual standing to intervene.

D. Bob Neiner Farms, Inc.

Applicant believes there has been an adequate showing of interest on behalf of the Bob Neiner Farms and its individual shareholders.

Aspect of the Proceeding

In addition to establishing his right to participate in this proceeding, a petitioner is required by 10 CFR §2.714(b) to identify the specific aspect or aspects of the subject matter as to which the petitioner seeks to intervene. Because of the relatively recent effective date of the current version of 10 CFR §2.714, the precise meaning of the term "aspect" as used in that section has not been clearly established by previous decisions of the Commission or its adjudicatory boards. However, if the term is to have any meaning whatsoever, the purpose of requiring the identification of the aspect of the subject matter as to which petitioner wishes to intervene must be to allow the Licensing Board to evaluate if the aspect is a proper subject matter for adjudication in a particular hearing.^{3/} "If facts pertaining to the licensing of a particular nuclear power plant are at issue, an adjudicatory proceeding is the right forum. But if someone wants to advance generalizations regarding his particular views of what applicable policies ought to be, a role other than as a party to a trial-type

^{3/} The Appeal Board in Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974) identified this as one of the reasons for the one good contention rule. While an "aspect" probably need not be as specifically drawn as a contention, and certainly need not specify the basis for any subsequently filed contentions (10 CFR §2.714(a)(3)), it certainly must be adequate to permit the Licensing Board to determine whether the hearing process at the operating license stage is being needlessly invoked. See: Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Power Station), ALAB-305, 3 NRC 8, 12 (1976).

hearing should be chosen." Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-128, 6 AEC 399, 401 (1973). If the only aspect or aspects of the subject matter identified in a petition are not proper subject matters for adjudication in an operating license adjudicatory hearing, the petitioner will clearly be unable to later draft one good contention within the scope of the identified aspect.

It is Applicant's belief that the Petitions may have adequately identified one aspect which meets the requirements of 10 CFR §2.714(a)(2).^{4/} This by no means indicates that it will be possible to draft at least one good contention within the scope of the aspect at such time as Petitioners will be required to do so. Furthermore, it is Applicant's belief that the vast majority of the aspects identified in the Petitions are not proper subjects for adjudication in this proceeding, as we will briefly discuss below.

^{4/} Some of the Petitions contain what their authors have termed "contentions." These so-called contentions fall far short of the requirements for a valid contention, and Applicant will, therefore, treat these "contentions" as attempting to raise "aspects" as to which Petitioners wish to intervene.

Each of the Petitioners appear to raise an issue concerning the impacts of eventual decommissioning of the proposed plants. (See: Neiner Contention 15, League Contention 2 insofar as it relates to plant decommissioning, Bailly Contention 3c and DAARE/SAFE Contention 3c). No Petition raises this matter in the form of a valid contention under 10 CFR §2.714(a)(3).

A. Matters Resolved During Construction Permit Proceedings.

A significant number of the "aspects" raised by Petitioners pertain to matters which were identified and resolved during the course of the construction permit proceedings. It is well settled that "an operating license proceeding should not be utilized to rehash issues already ventilated and resolved at the construction permit stage." Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-74-12, 7 AEC 203 (1974). This limitation with respect to the issues which must be examined during the course of an operating license proceeding is reasonable given the detailed review of environmental and safety-related impacts associated with the operation of a nuclear reactor which takes place during the construction permit proceedings. Only those matters which, because of supported assertions of changed circumstances or special public interest factors, might lead to different conclusions than those which resulted from construction permit review should properly be the subject of reexamination during the course of an operating license proceeding. See: Alabama Power Company, supra; Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1422 and fn. 5 (1977); and 10 CFR §51.21.

The following is a nonexclusive listing of some of the more glaring attempts on the part of Petitioners to raise matters which were adequately resolved during the construction permit proceedings for the Byron and Braidwood

Stations without any attempt whatever to demonstrate why they should be reexamined at this time.^{5/}

(1) Neiner Farms Petition: Contentions 13, 14, 17, 18, 21, 22, 23, 24, 25, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41 and 42.^{6/}

(2) League of Women Voters Petition: Aspects 2, 4, 8, 9 and the aspect questioning the need for power on pp. 4-5 of the Petition.

(3) DAARE and SAFE Petition: Aspects 1, 2, 6, 7(a), (b), (d), (e) and (f), and 8 and 9.

(4) Bailly Alliance Petition: Contentions 1, 2 and 5.

B. Attacks on Statutes and Regulations.

10 CFR §2.758 precludes a party from challenging the Commission's regulations in the course of adjudicatory proceedings except under special circumstances not established

^{5/} It is Applicant's understanding that under 10 CFR §2.714(a) such a showing can appropriately be postponed until the contention stage of pleading.

^{6/} Contentions 29-41 in this Petition all pertain to Department of Interior comments submitted with respect to the draft environmental statement prepared in conjunction with the NRC Staff review during the construction permit stage of this proceeding. The Staff's consideration of the issues raised by these comments is reflected at pp. 11-1 through 11-9 of the Braidwood FES and in changes in the text of the FES itself. FES, p. 11-1. Petitioner's attempt to resurrect these issues is, on its face, contrary to the principle set forth above with respect to "rehashing" issues which were resolved during the course of the construction permit proceedings.

by any Petitioner in its Petition. Furthermore, general policy questions with respect to the appropriateness of the statutory framework or NRC regulatory process by which nuclear power plants are licensed are not proper subjects for adjudication in licensing actions before the Commission. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974). See also: Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978). Likewise, aspects which seek to raise issues with respect to the eventual permanent disposal of radioactive wastes are improper subjects for adjudication in a licensing proceeding. See: Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 51 (1978) and NRDC v. NRC, 582 F.2d 166 (2nd Cir., 1978). Finally, in view of the decision in Duke Power Company v. Carolina Environmental Study Group, Inc. et al., 98 S.Ct. 2620 (1978), which upheld the constitutionality of the Price Anderson Act, aspects attempting to question the adequacy of the remedy afforded by that Statute are impermissible.

Applicant submits that a number of the aspects raised by Petitioners can only be interpreted as direct challenges to regulations in violation of 10 CFR §2.758 or as attempts to litigate policy issues which are not proper subjects for adjudication in individual licensing proceedings. Again, Applicant will point to some of the more obvious examples of such improper "aspects."

(1) Neiner Farms Petition: Contentions 16 and 26.

(2) League of Women Voters Petition: Aspects 2 (as it relates to "removing spent fuel from the site" and low-level waste disposal) and 8.

(3) DAARE and SAFE Petition: Aspects 1, 3a, 3c, 5, 6, 7e, 7f and 9.

(4) Bailly Alliance Petition: Contentions 1(b), 1(c), 2, 3(a), 4, 5(d), 5(e) and 5(f).

C. Unresolved Generic Safety Issues.

The Appeal Board in Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 773 (1977), set forth the requirements which must be satisfied in order to introduce generic safety issues into individual facility licensing proceedings. The party attempting to raise the matter must establish a "nexus" between the generic issue and the safety of the specific facility which is the subject of the licensing proceeding. Id. at 773. In stating the aspects as to which they desired to intervene, some of the Petitioners have apparently attempted to introduce matters relating to generic safety issues by merely identifying generic issues without establishing the requisite nexus. Examples of such "aspects" are set forth below.

(1) DAARE and SAFE Petition: Aspect 7.

(2) League of Women Voters Petition: Aspect 1.

D. Financial Considerations.

In Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC 155, 162 (1978), the Appeal Board considered the extent to which the NRC must concern itself with an applicant's financial matters:

In the Atomic Energy Act, Congress did not make this agency responsible for assessing whether a proposed nuclear plant would be the most financially advantageous way for a utility to satisfy its customers' need for power. Such matters remained in the province of the utility and its supervising State regulatory commission.

Certain of the aspects raised by Petitioners appear to be an attempt to introduce issues into this proceeding pertaining to financial concerns which should be deemed irrelevant to the Commission's consideration of the proposed license application. Examples of such aspects are listed below.

- (1) Bob Neiner Farms Petition: Contention 42.
- (2) DAARE and SAFE Petition: Aspect 2.
- (3) Bailly Alliance Petition: Contention 5(b).

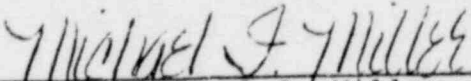
Conclusion

Applicant fully recognizes that, at this stage of the proceeding, the Rules of Practice only require that Petitioners identify "aspects" as to which they wish to intervene in this proceeding. Petitioners were not required to draft specific, well-pleaded contentions and clearly have not done so. Of course, Applicant reserves the right to challenge the contentions, if any, filed in this proceeding

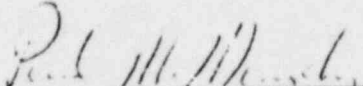
for failing to meet the requirements of 10 CFR §2.714(a)(3),
if and when such contentions are filed.

As Petitioners, League of Women Voters, SAFE,
DAARE and the Bailly Alliance have failed to establish
standing to intervene in this proceeding, their Petitions
should be denied.

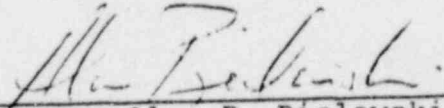
Respectfully submitted,



Michael I. Miller



Paul M. Murphy



Alan P. Bielawski

Attorneys for
Commonwealth Edison Company

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ISHAM, LINCOLN & BEALE
One First National Plaza
Suite 4200
Chicago, Illinois 60603
(312) 786-7500

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
)

COMMONWEALTH EDISON COMPANY)

(Byron Station, Units 1 and 2 and)
Braidwood Station, Units 1 and 2))
)

Docket Nos. 50-454
50-455
50-456
50-457

CERTIFICATE OF SERVICE

I, Alan P. Bielawski, one of the attorneys for Commonwealth Edison Company, certify that copies of "Answer of Commonwealth Edison Company to the Petitions to Intervene of Bob Neiner Farms, Inc., et al., League of Women Voters, DAARE and SAFE and the Bailly Alliance" have been served in the above-captioned matter on the following by United States mail, postage prepaid, this 29th day of January, 1979:

Myron Karman, Esq.
Office of the Executive Legal Director
United States Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Marty Westerman
Rt. 1, Box 279
St. Anne, Illinois 60964

C. Allen Bock, Esq.
P.O. Box 342
Urbana, Illinois 61801

Thomas J. Gordon, Esq.
Waalder, Evans & Gordon
2503 South Neil
Champaign, Illinois 61820

Ms. Betty Johnson
1907 Stratford Lane
Rockford, Illinois 61107

Ms. Marilyn J. Shineflug
P.O. Box 261
DeKalb, Illinois 60115

Mr. Cordell Reed
Commonwealth Edison Company
P.O. Box 767
Chicago, Illinois 60690


Chief Hearing Counsel
Office of the Executive Legal Director
United States Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing Board Panel
Attention: Chief, Docketing and Service Section
United States Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing Appeal Board Panel
Attention: Chief, Docketing and Service Section
United States Nuclear Regulatory Commission
Washington, D.C. 20555

Secretary
Attention: Chief, Docketing and Service Section
United States Nuclear Regulatory Commission
Washington, D.C. 20555

DATED: January 29, 1979



Alan P. Bielawski