UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

HOUSTON LIGHTING & POWER COMPANY, ET AL.
(South Texas Project, Units 1 & 2)

Docket Nos. 50-498-OL
50-499-OL

APPLICANTS' ANSWER TO SUPPLEMENTAL INFORMATION AND ACEE PETITION FILED BY PETITIONERS SUBSEQUENT TO SPECIAL PREHEARING CONFERENCE

I. INTRODUCTION

The subject pleadings represent still another opportunity afforded the Petitioners in this proceeding to state clearly their interests and how those interests may be affected as required by 10 CFR § 2.714.

To date, the Board has received:

(1) An initial petition to intervene by David Marke, dated August 24, 1978, hereinafter "Marke I";

(2) A supplemental petition by David Marke, dated December 26, 1978, purporting for the first time to represent Austin Citizens for Economical Energy (ACEE), hereinafter "Marke II";

(3) An oral presentation by Mr. Marke regarding his standing and that of ACEE at the special prehearing conference on January 11, 1979;

(4) The instant Marke pleading, dated January 19, 1979, hereinafter "Marke III," and filed together with a "Petition by Austin Citizens for Economical Energy & Bill of Contentions" on the part of ACEE (hereinafter "ACEE petition").

Repeated efforts to establish standing have also been made by Citizens Concerned About Nuclear Power (CCANP). Their latest pleading seeks to meet requirements necessary to establish representational standing and includes evidence of the authority of Ms. Coral Ryan to represent the group and a supporting statement of Mr. George J. Bunk (apparently a resident near the STP site) authorizing CCANP to represent him in these proceedings.

Why the successive pleadings on the standing issue? In brief, the answer lies in the fact that:

(1) Mr. Marke lives more than 100 miles from the STP site and has had to "scramble" to establish some nexus with the site;

(2) ACEE, a late Petitioner, is apparently an organization of Austin citizens likewise residing more than 100 miles from the site save *one* couple who are allegedly "site representatives of ACEE" but never clearly defined as members of the organization;

(3) CCANP, an organization with a stated educational purpose, initially described as an organization of "residents of San Antonio," who also live more than 100 miles from the site, has likewise had to "scramble" to find a single member (Mr. Bunk) resident within the "geographical zone of interest."

The ASLB, as evidenced by its order of October 23, 1978 (noting serious defects in the petitions), and in the course of the prehearing conference, has been more than generous in allowing opportunities to amend and clarify. Yet the Petitioners still fail to overcome the defects noted by both Applicants and Staff in prior pleadings and at the special prehearing conference.

Marke III essentially repeats verbatim the statement of interest in Marke II. Some cursory information is provided as to Mr. Marke's recreational activities, but other than this, he does not provide anything further relating to his standing as a matter of right or discretion. Finally, Marke III repeats the contentions listed in Marke II, adding statements (generally in the form of questions with no further basis) to some, but not all, of the prior contentions.

The ACEE Petition and its Bill of Contentions states that ACEE "requests standing as an individual entity but still desires to be represented by Mr. Marke." (p. 1). However, the petition repeats *in haec verba* the contents of Marke II with respect to ACEE's interest and gives no further identification of ACEE, its interests, and how those interests will be affected by this proceeding.

As discussed below, none of the Petitioners, based upon these supplemental filings, should be allowed party-intervenor status. In sum:

(1) Mr. Marke as an individual has failed to state a single new fact which would establish his standing to participate in this proceeding. As discussed below, Mr. Marke's credentials as an "expert" are yet to be established. In any event, there is no basis

to believe he is likely to make a substantial contribution to a hearing if one should be held as a matter of discretion;

(2) The ACEE petition for leave to intervene fails to meet even the minimal standards set forth in 10 CFR § 2.714; and

(3) CCANP has failed to cure the basic defect noted by Applicants and Staff in their responses to CCANP's earlier pleadings and at the special prehearing conference; that is, it has not established a commonality of interest between its single, identified member residing within the vicinity of the STP site and the organization itself.

Each matter is discussed further below.

II. PETITIONERS HAVE NOT ESTABLISHED STANDING

A. Marke

1. *Intervention as of Right.* Marke III is essentially the same as Marke II on the matter of standing as of right.[1] With the exception of some additional information purportedly relevant to Petitioner's recreational activities,[2] nothing further is provided.

A last effort to specify the extent and nature of Mr. Marke's fishing activities fails. Referring to Figure 2.1 from the STP Final

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[1] Both the Applicants in their response of January 5, 1979 (pp. 11-14), and the NRC Staff in its response of January 8, 1979 (pp. 4-7), opposed Mr. Marke's standing as a matter of right.

[2] Neither Applicants nor the Staff considered Petitioner's alleged recreational activities sufficient to meet the requirements for standing to intervene in this proceeding (Applicants' response, pp. 12-13; Staff's response, pp. 5-6; Tr. 65-66, 68).

Environmental Impact Statement, Marke III points out (p. 11) that portions of the coastline and the Gulf of Mexico fall within 50 miles of the STP site. Petitioner does no more than state a geographic fact. He fails to clarify — and indeed further confuses — matters as to frequency, location and duration of his fishing activities.[3]

The only other new item in Marke III with respect to his recreational activities is the assertion that he engages in fishing "weekly to bi-monthly." His earlier statements that he fished "bi-monthly" and that during the winter "the frequency is occasionally bi-weekly" (Tr. 34) are thus transformed to a more frequent interval without benefit of explanation. The fact remains that it has proven impossible, notwithstanding efforts by the Board (Tr. 32-34), to pin down the extent of Mr. Marke's recreational pursuits and where they take place. One can only say that from time to time[4] Mr. Marke, while cruising the approximately 175-mile stretch of waters between Galveston and Port Aransas, may on some of his excursions fish somewhere within the geographic zone of interest. That is plainly insufficient to confer standing.

Mr. Marke has failed to demonstrate with any reasonable degree of clarity, specificity or consistency, that he engages in substantial recreational activities close enough to the site to afford him standing to intervene in this proceeding as a matter of right. Indeed, even

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[3] Compare Tr. 34 with Tr. 69 and Marke III, p.2.

[4] Mr. Marke estimates that chances are about "50-50" he follows the fish into the area closest to the STP site. (Tr. 34) This may well be an overestimate in view of the fact that the ports from which he departs are each more than 75 miles from the area of the coast closest to the plant, and the fact that he sometimes has "gone as far east as the Louisana coastline," (Tr. 33) away from the STP site.

assuming the facts most favorable to Mr. Marke, none of the NRC cases have gone so far as to allow intervention under such circumstances.[5] In the *Peach Bottom* proceeding,[6] the recreational activities under consideration by the Commission as a basis for intervention were on the facility's own cooling pond. And, in the *Grand Gulf*[7] case mentioned by the Board at Tr. 66, there was not only an allegation that petitioner boated on the Mississippi River "right by the site," but that petitioner also used the Grand Gulf Park which was contiguous to the site. It is therefore submitted that Mr. Marke's vague, unspecific and inconsistent statements concerning his fishing activities cannot serve as a basis for intervention as of right.

2. *Discretionary Intervention.* Even if it is assumed that Mr. Marke has set forth a contention which meets the requirements of 10 CFR § 2.714 (b)[8] the question is presented whether he should be permitted to intervene as a matter of discretion even though he is not entitled to intervene as of right. We submit that discretionary intervention should not be accorded to Mr. Marke because there is no clear indication that his participation in a hearing would contribute to the

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[5] See *e.g., Public Service Co. of Oklahoma* (Black Fox Station, Units 1 and 2), ALAB-397, 5 NRC 1143, 1150 (1977); *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2) Docket Nos. 50-338SP, 50-339 SP, ASLB Order, December 8, 1978.

[6] *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3) CLI-73-10, 6 AEC 173 (1973).

[7] *Mississippi Power and Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2) ALAB-130, 6 AEC 423, n.8 (1973).

[8] Such an assumption cannot be made. See Part III below.

proceeding or the decision-making process.[9] The admonition of the Appeal Board in the *Watts Bar* operating license proceeding is peculiarly appropriate here:

> . . . there is particularly strong reason why discretionary intervention should not be allowed in the absence of some clear indication that the petitioner has a substantial contribution to make on a significant safety or environmental issue appropriate for consideration at the operating license stage.

Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2) ALAB-413, 5 NRC 1418, 1422 (1977).

Mr. Marke fails this critical test. Despite the extension of repeated opportunities, he has wholly failed to supply a "clear indication that [he] has a *substantial* contribution to make on a significant safety or environmental issue." He does assert that he is a "scientist, whose original background is in the field of nuclear chemistry. . .," that he is "an accredited expert in the field. . .,"[10] that he has "a Bachelor of Science degree in Nuclear Chemistry from the University of Nevada. . . and a Master of Science degree from the University of California at Berkeley. . .,"[11] that he worked in the nuclear engineering laboratories and the cyclotron laboratory at the latter institution, and that he "has been widely published in the scientific community on topics not only

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[9] *Virginia Electric and Power Company* (North Anna Power Station, Units 1 and 2) ALAB-363, 4 NRC 631, 633 (1976); see also *Portland General Electric Company et al.* (Pebble Springs Nuclear Plant, Units 1 and 2) CLI-76-27, 4 NRC 610, 617 (1976); *Public Service Company of Oklahoma et al.* (Black Fox Station, Units 1 and 2) ALAB-397, 5 NRC 1143, 1145 (1977); *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2) ALAB-413, 5 NRC 1418, 1422 (1977).

[10] The field referred to is apparently "radioactive containmenation." [sic]. See Marke I, p. 1.

[11] Tr. 58.

limited to radiochemistry, but in the field of radioisotope disposition and containment," and has "expertise in the field of nuclear waste management."[12] However, Mr. Marke has not cited any of his publications even though his failure to do so was noted at the special prehearing conference and he had an opportunity to do so.[13]

Applicants' counsel has had a number of publication indices[14] checked; no citation to any publication by Mr. Marke was found. In addition, the Records Offices of the two campuses of the University of Nevada have advised that they have no record of the graduation there of a David Marke.[15] The Office of Admissions and Records of the University of California at Berkeley advised that it has no record of a David Marke having attended the institution. We are further advised by the Office of the Recorder, University Extension, that there is no record of Mr. Marke's enrollment in extension, correspondence or independent study courses at Berkeley. It is, of course, possible that these efforts were incomplete or that an error has been committed. However, they do raise a serious question as to Mr. Marke's credentials.

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[12] Marke II, p. 14.

[13] Tr. 16. In response Mr. Marke said: "If the Board desires, I will send a copy of my resume along with the next communication that I send, so that they can see the publications that I have done." (Tr. 58). However, he did not do so in his "next communication," noting that his resume "was not specifically requested." (Marke III, p. 4).

[14] *Nuclear Science Abstracts; Science Citation Index; INIS Atomindex; Readers Guide to Periodical Literature.*

[15] The Reno Records Office reported having a record of a Roy David Marke, Jr., who attended the College of Arts and Sciences for two semesters in 1964-1965.

Even if Mr. Marke's expertise is as he describes it, the most that can be concluded from his statements is that he might be able to contribute something to issues relating to radioactive releases if his contentions concerning those matters (Contentions 4 and 16) should be admitted. However, as we demonstrate below, they should not be admitted.[16] And in any case, nothing in Mr. Marke's background provides a reason to believe that he can make a "substantial contribution" to their resolution.

Indeed, everything points in the other direction. Mr. Marke has by now made three filings in support of his petition for intervention and actively participated in the all-day special prehearing conference of January 11, 1979. It is appropriate to draw conclusions from this body of material. One such conclusion is that he wholly misapprehends the nature of this proceeding and how it fits into the system of regulation which has been established under the Atomic Energy Act. It appears to be his assumption that it is appropriate in this proceeding to address all issues of concern to him whether or not they have been resolved by Congress or the Commission in other contexts. For example, he wishes to address routine operating releases (Contentions 4, 11 and 12) without apparent regard to 10 CFR Part 50, Appendix I and the extensive hearings which preceded the adoption of that regulation. Similarly, while he appears to be aware of a "proposed rulemaking" relating to

[16] Even if these contentions were admitted, they are expressed in such broad and imprecise terms that it is not possible to determine whether Mr. Marke's special expertise—or anyone else's—is of the type that is required to address these contentions.

ECCS systems[17] he was either unaware of the existing rule (10 CFR Part 50, Appendix K) or ignored it in submitting Contention 3.[18] And, while he is apparently aware of the Price-Anderson Act, he appears to think that the appropriateness of that legislation should be addressed in the hearing.[19]

During the prehearing conference Mr. Marke admitted his "inadequacy and unfamiliarity of dealing with this type of proceeding. . ." (Tr. 122), which may be understandable; what cannot be excused is Petitioner's failure over the past several months to generally familiarize himself with such basic documents as the Staff Safety Evaluation Report (NUREG—75/075), and the Final Environmental Statement (NUREG—75/019) on the South Texas Project.[20] It is apparently the failure to consult such basic sources that led Mr. Marke to make charges regarding potential fire hazards associated with the location of the diesel fuel tanks without regard to the fact that the matter had been clearly considered in the Safety Evaluation Report and resolved in the Supplement to that Report (Tr. 176-177).[21]

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[17] Marke II, pp. 19-20.

[18] On January 24, 1979, Mr. Marke filed an "Emergency Request for 'New Evidence' Status: Filed by David Marke and Austin Citizens for Economical Energy." It is not clear from the pleading the nature of the relief sought. In any event, it is irrelevant. The Interim General Statement of Policy issued by the NRC on August 21, 1974 (39 F.R. 20964-5, August 27, 1974), which states that the Rasmussen Report is "not an appropriate basis for licensing decisions."

[19] *Supra*, p.27, Contention 13.

[20] See, e.g., Applicants' Response to Amended Petitions for Leave to Intervene, dated January 5, 1979, at pp. 31, 33, 36, 41.

[21] Petitioner perpetuates this misunderstanding in an amendment to Contention 15 (Marke III, p. 28).

Based on the foregoing, Applicants submit that a "*clear indication* that the Petitioner has a *substantial contribution* to make on a significant safety or environmental issue. . ." required by *Watts Bar* cannot be found here. If any indication is clear here, it is to the contrary.

This conclusion is strengthened by application of the second part of the *Watts Bar* test; the likely contribution must relate to "an issue appropriate for consideration at the operating license stage." The Commission has declared 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) 7 AEC 203 (1974). Yet this is precisely what Mr. Marke wishes to do. He states it is "the need for *building the plant* or operating it, which is what we are discussing at this point. . ." (Tr. 146, emphasis supplied) and that: "We cannot rely upon questions which were investigated some several years ago as having still-current answers" (Tr. 146-47). It is apparently because of this view of the proceeding that he wishes to address contentions such as need for power from the plant, alternative power sources and ECCS performance, all of which were dealt with comprehensively at the construction permit stage. The grant of discretionary intervention for this purpose is wholly inconsistent with the objectives of the Act.[22]

[22] Thus, in approving the denial of discretionary intervention in *Watts Bar*, the Appeal Board gave substantial emphasis to the fact that issues sought to be litigated had been fully reviewed at the construction permit stage. 5 NRC at 1422, n.5.

B. ACEE

Attached to Marke III is the ACEE Petition, signed by David Marke, which states that it "is intended as a modification of petitioner David Marke's Supplementary Petition December 26, 1978." It also states that: "By direction of the Board ACEE hereby requests standing as an individual entity but still desires to be represented by Mr. Marke."

10 CFR § 2.714(a)(2) directs that such a petition "shall set forth with particularity the interest of the petitioner in the proceeding. . ." and "how that interest may be affected by the results of the proceeding. . . ." The regulations also require that a petitioner submit sufficient information to allow the ASLB to reach an informed judgment as to the factors enumerated in 10 CFR § 2.714(d) which govern the grant of intervention. These include the nature of the petitioner's right under the Atomic Energy Act to be made a party, the nature and extent of petitioner's "property, financial, or other interests in the proceeding," and the effect of any order which may be entered on the petitioner's interest.

ACEE simply skips these requirements; instead, the petition merely reproduces *in haec verba* that portion of Marke II entitled "B. *Plea for Standing as a Representative of a Quasi-Public Body.*" In no way does that "Plea" contain the particularity or specificity required by 10 CFR § 2.714. With respect to an organization apparently based in Austin, more than 100 miles from the plant, it states only that it represents "citizen/ratepayers who consider the operation of this reactor

either jeopardizes their physical health, their mental health, their real property, and such other rights. . ." as may be protected by the Atomic Energy Act and NEPA. Such generalities are clearly insufficient.

Nor did Mr. Marke's description of the organization at the prehearing conference supply any of the missing detail. The nature of the group, its interests and organizational structure are most unclear. He stated that, while the organization "has a core group of 120 or 150 *members*, there are several thousand people *involved* with it . . ." (Tr. 26; emphasis supplied). He also stated that the organization consists of essentially "a consensus group" who are not governed "by a strict set of operating rules." (Tr. 31) None of this clarified ACEE's interests or specified how they would be affected by this proceeding.

It is significant that, although this Board was obviously interested in clarifying the question whether ACEE desires admission as a party or simply to have its interests represented by Mr. Marke (Tr. 25-32, 37-40), the answer still remains equivocal. Mr. Marke stated at the *January 11 prehearing*: ". . . I do not believe that the group has actually addressed the question of whether, as a legal entity, they wish to become a party to the proceeding." (Tr. 38). Curiously, an instrument attached to the ACEE Petition executed by Mr. Roger Duncan, Chairman of ACEE, authorizing Mr. Marke's representation states that "Mr. David Marke was authorized to speak and/or petition on behalf of ACEE in the above-captioned matter," as a result of "action taken in *September, 1978*." (Emphasis supplied) These internally conflicting statements can only be reconciled if the action of September,

1978 is construed not as an authorization to pursue separate intervenor status for ACEE but rather to have Mr. Marke in *his* role as party intervenor to represent the interests of ACEE.

A similar fog surrounds the question whether ACEE can validly predicate standing to intervene on the basis of the interest of any of its members. We have already pointed out that Mr. Marke has distinguished between people "involved with" ACEE and its "members" (Tr. 26). This distinction is made in Marke II, (p. 11) and is repeated in the ACEE petition (p. 2). Each refers to the organization having "100 formally aligned members in Austin and other communities. . ." and "a constituency of several thousand residents and consumers. . ." of other areas, "including Mr. and Mrs. Robert Cook of Wadsworth, Texas, who reside less than 8 miles from the reactor." To be sure, both petitions contain an Appendix A with the "ACEE Steering Committee Directory." That list contains the names of "Mr. & Mrs. Robert Cook, site representatives."

Ordinarily the inference might be made that members of an organization's Steering Committee are members of the organization. Where, however, repeated distinctions are made between "members" and persons who constitute part of some other "constituency," that assumption can no longer be made. Obviously, the question of membership could have been easily clarified in the document signed by Mr. and Mrs. Cook and attached to the ACEE Petition. However, they merely state that, as "site representatives," they support the "position and operating guidelines of ACEE." Even if they are members, the relationship between them and the organization has not been

established to be such as to confer standing upon ACEE. This is a matter which is discussed in greater detail below with respect to CCANP.

In view of the foregoing, ACEE may not be accorded intervention as of right. It has neither stated its own legally cognizable interest nor established its right as a representative of "members" with such interests. Nor is there the slightest basis for according it discretionary intervention, whether as a "singular" entity or otherwise. ACEE obviously intends "to be represented by Mr. Marke," and, based on a fair reading of the pleadings and Mr. Marke's statements at the prehearing conference, he represents essentially all the "expertise" readily available to the organization. Since Mr. Marke is not entitled to discretionary intervention, neither is ACEE.

Finally, this Board twice expressly requested an explanation for the lateness of ACEE's petition in the event that it filed one. (Tr. 41, 46) The request has simply been brushed aside. Consequently the Board has no basis upon which it can entertain ACEE's untimely petition. 10 CFR § 2.714(a). Note in this connection that ACEE acknowledges that it knew of this proceeding as early as September, 1978. (See p. 13 , *supra*).

C. CCANP

1. *Intervention as of right.* CCANP filed a second "Petition for Leave to Intervene" on December 26, 1978, and later requested that it be treated as replacing its earlier filed petition (Tr. 71). The second petition alleged that CCANP's members may be subject "to unnec-

essary risk of life and/or property from accidental or ordinary operation. . ." of the facility, and that its members were "concerned" that mistakes and delays in construction would adversely affect both safety and economic interests. These allegations fail to meet the requirements imposed by 10 CFR § 2.714 that the nature of petitioner's interests, how those interests will be affected, and the specific aspects of the proceeding concerning which they wish to intervene be specified with particularity. This was pointed out both by the Staff in its response dated January 8, 1979, at p. 2, and in the Applicants' response dated January 5, 1979, at p. 3.[23] No additional specification or particularization required to comply with 10 CFR § 2.714 has since been supplied.

However, CCANP has now produced a letter from Mr. George J. Bunk stating that he resides within seven miles of the project, that he desires CCANP to represent his interest in the proceeding, and that he adopts and supports "the statements of interest and contentions. . ." contained in the second petition.

In its original petition, CCANP described itself as "a San Antonio, Texas, based organization." The second petition states (p. 1) that there are members in "Bexar [San Antonio] and Matagorda Counties. . .," that the organization "has approximately 120 members. . ." and that at "least four[24] of those members reside within twenty-five miles of the. . ." project (Matagorda County). Consequently, the overwhelming

[23] Applicants and Staff also found that not a single good contention accompanied the CCANP petition. Even if the defects associated with standing could be corrected, therefore, the petition would nevertheless fail.

[24] However, only one of those members is shown to be represented in this proceeding by CCANP.

majority of the membership lives in the San Antonio area, more than 100 miles from the plant and outside the geographical zone of interest.

Moreover, the second petition states:

> The members are *primarily interested in providing education and influencing policy* regarding issues surrounding the use of nuclear power.

(p. 1; emphasis supplied). This primary concern was reemphasized at the prehearing conference. There its representatives said that CCANP was "mainly organized . . . to investigate the issues of nuclear power and to educate ourselves and the citizens. . . ," that citizens "want to find out more about the actual running of the plant. . ." (Tr. 71-73).

In sum, CCANP is an organization "primarily interested in education"; it is based far beyond the recognizable geographical zone of interest; and the overwhelming majority of its members live far outside that zone. Only a single member, Mr. Bunk, has both a cognizable interest in the safety and environmental aspects of the plant's operation and has requested CCANP to represent him. All of the rest of the members either can assert no interest or have not requested the organization to represent them. On this record we submit that CCANP cannot intervene as of right unless there is a *per se* rule that one member with protectible rights may, under any circumstances, confer legal standing upon an organization which does not otherwise have such standing. We further submit that no such *per se* rule exists.

For purposes of determining intervention as of right, the Commission relies "upon contemporaneous judicial concepts of standing. . . "

Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 and 2) CLI-76-27, 4 NRC 610, 614 (1976); see also *Edlow International Company*, CLI-76-6, 3 NRC 563, 569-70 (1976). In turn, the law of standing is grounded in the "Case or Controversy" Clause, Article III, of the Constitution. Only those individuals with a real and personal stake in a controversy are allowed to invoke the jurisdiction of the courts, for, under the Constitution, the courts are not a proper forum for the assertion of generalized grievances of interests which do not rise to the level of an actual controversy between two or more parties. Thus, it has been stated on numerous occasions that an individual must allege "a sufficient personal stake" in a particular proceeding "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult. . . questions." *E.g., Baker v. Carr*, 369 U.S. 186, 204 (1962). The Commission has recognized that such a personal stake forms the basis for the determination whether a particular party should be permitted to invoke the jurisdiction of this Commission's licensing boards. As the Commission recently stated:

> The functional need for well-defined and specific interests, which will lend concrete adversity to the decision-making process, applies as directly to our licensing review as it would to a federal lawsuit.

Edlow, 3 NRC at 510; *See also, Pebble Springs*, 4 NRC at 613-14. Consequently, as a general rule, a party may not obtain standing to represent the interests of a third party not before the court. This rule has been expressly adopted by at least two NRC Appeal Boards. *Tennessee Valley Authority* (Watts Bar Units 1 and 2) ALAB-413, 5 NRC

1418, 1421 (1977); *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2) ALAB-470, 7 NRC 473, 474 n.1 (1978). Of course, the courts, too, have "narrowly limited the circumstances in which one party will be given standing to assert the legal rights of another." *Duke Power Company v. Carolina Environmental Study Group,* ____U.S.____, 98 S.Ct. 2620, 2634 (1978). The Court there stated:

> There are good and sufficient reasons for this prudential limitation on standing when rights of third parties are implicated—the avoidance of the adjudication of rights which those not before the court may not wish to assert, and the assurance that the most effective advocate of the rights at issue is present to champion them. *Id.*

In those cases in which the courts have permitted standing to assert the rights of third parties, one factor which recurs is "the presence of some substantial relationship between the claimants and the third parties." Note: *Standing To Assert Constitutional Jus Tertii,* 88 HARVARD LAW REVIEW 423, 425 (1974) (citations omitted).

One of the exceptions to the rule against third party representation, recognized in *Sierra Club v. Morton,* 405 U.S. 727 (1972), is that it is possible for an organization to obtain standing to represent the interests of its members. After refusing to grant standing to the organization on the basis of its "long-standing concern with and expertise in" environmental matters, the Court stated that the Sierra Club could obtain standing under a rule "that an organization whose members are injured may represent those members in a proceeding for judicial review." 405 U.S. at 739.

However, the quoted language cannot be interpreted to mean that an organization may in all circumstances represent its members. *Sierra Club v. Morton* relied for its conclusions upon *NAACP v. Button*, 371 U.S. 415 (1963), one in a series of cases in which the NAACP sought to obtain standing to assert the constitutionally protectible rights of its members. There the Court held that the NAACP could assert rights related to activities in which the organization itself was engaged, stating that the NAACP "has standing to assert the *corresponding* rights of its members." 371 U.S. at 428 (emphasis supplied). In support of the latter assertion , the Court cited *NAACP v. Alabama ex rel. Patterson*, 377 U.S. 449, 458-60 (1961) in which the Supreme Court had earlier held that the NAACP had standing to assert the Constitutional rights of its members. 357 U.S. at 458-60. It is clear from the latter opinion that as a prerequisite to allowing the NAACP to assert the right of third party members, the Court required that there exist a "nexus" with these members "sufficient to permit that it act as their representative before this Court." *Id.;* see also *National Motor Freight Traffic Association, Inc. v. United States*, 372 U.S. 246 (1963).

These cases demonstrate that an organization may be granted standing to represent the interests of its members only when the interests of the organization sufficiently coincide with those of the members so that the organization is a "proper" representative. *Id.* at 247. Such a requirement coincides with the underlying premise that in order for an individual to obtain standing he must allege a "sufficient personal stake" in the proceedings.

At least one court since *Sierra Club* has recognized this limitation. In *River v. Richmond Metropolitan Authority*, 359 F.Supp. 611, 624 n.29 (E.D. Va. 1973), the Court stated:

> Generally, a party may assert only his own rights in litigation, not those of a third party. An exception to this rule was recognized in *NAACP v. Alabama*, 357 U.S. 449, 48 S.Ct. 1163, 2 L.Ed. 2d 1488 (1958), where the assertion of their rights by the members of an organization would have had the effect of waiving those rights and has been extended in certain other first amendment cases. *E.g.*, *NAACP v. Button*, 371 U.S. 415, 428, 83 S.Ct. 328, 9 L.Ed. 2d 405 (1963), cited in *Sierra Club v. Morton*, 405 U.S. 727, 739, 92 S.Ct. 1361, 1368 (1972). The Court in *Sierra Club* seems to have adopted this same exception for cases such as that presently before this Court. Certainly, however, it would be restricted to those organizations whose purposes extend to the protection of the injured interests of their members.

To be sure, the language of *Sierra Club v. Morton*, quoted above, may have been used to support grants of standing to organizations without express reference to the required nexus between the interests of the organizations and their members. However, we believe that those cases arose in a context in which an organization's purposes necessarily involved protection of the interests of the members it sought to represent. This was so in the cases involving national organizations such as the NAACP and the Sierra Club. It is also so in cases where there is a local organization representing members residing in the locality and affected by a matter having local impacts. *E.g.*, *Mansfield Area Citizens Group v. United States*, 413 F.Supp. 810 (M.D.Pa. 1976); *Loveladies Property Owners Association v. Raab*, 430 F.Supp. 276 (D.N.J. 1975). However, we have found no case where a predominantly local

organization, based in one area, has been permitted to represent individuals residing in a distant area with respect to matters affecting (in the legal sense) only the latter.

Recent Supreme Court cases clearly indicate that the Court will take more than a superficial look at the interests of a particular petitioner organization before granting representational standing. In *Warth v. Seldin*, 422 U.S. 491 (1975), and in *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), the Supreme Court closely analyzed the interests of the petitioners even after recognizing that they were organizations asserting the rights of their membership, and denied standing. Most recently, in *Hunt v. Washington State Apple Advertising Commission*, ____ U.S.____, 97 S.Ct. 2434 (1977), the Supreme Court analyzed the particular factors which Applicants here assert must be considered before granting standing to CCANP.

In *Hunt*, Chief Justice Burger, writing for a unanimous Court, stated:

> Thus, we have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) *the interests it seeks to protect are germane to the organization's purpose;* and (c) neither the claim asserted nor the relief requested, requires the participation of individual members in the lawsuit. 97 S.Ct. at 2441 (emphasis supplied).

The emphasized language indicates that there must be a sufficient nexus between the interest of the particular members whose rights are being asserted as the basis for organizational standing and the purposes of the organization seeking to represent them. In *Hunt*, the Court held

that the Washington Apple Advertising Commission, although a state agency, had the purpose of "protecting and enhancing" the apple industry in the State of Washington. Thus, it was a proper representative of the interests of apple growers in that state, because it had represented their economic interests in the past.[25]

As Applicants demonstrated in their "Response to Amended Petitions For Leave To Intervene" dated January 5, 1979, pp. 3-11, the Commission has also required more than a mere allegation that an organization has members residing within the geographical zone of interest. *E.g., Nuclear Engineering Company. Inc.* (Sheffield, Illinois Low Level Radioactive Waste Disposal Site) ALAB-473, 7 NRC 737 (1978); Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station) ALAB-328, 3 NRC 420 (1976); *Virginia Electric and Power Company* (VEPCO) (North Anna Power Station Units 1 and 2) Docket Nos. 50-338SP, 50-339SP, ASLB "Order and Recommendation on Petitions for Leave to Intervene" dated December 8, 1978. No adjudicatory body of this Commission has been called upon to analyze a situation such as the one presented here in which a predominantly local organization (essentially all of whose members reside outside the

[25] In *Hunt* the Court found the organization itself might suffer injury in fact. The coalescence of that injury and the injury to those it represented was a factor in the recognition of standing. 97 S.Ct. at 2442. No such potential injury to CCANP exists.

geographical zone of interest) has attempted to base its standing solely upon the interests of one single, segregated member. [26]

The cases and principles discussed above demonstrate that there is no *per se* rule that an organization will be granted standing to represent a single injured member. In fact, there could not conceivably be such a rule. Standing cannot be determined on the basis of broadly phrased "black-letter" rules of general applicability. [27] Rather the facts in each case have to be examined to determine whether in reality "the interests it seeks to protect are germane to the organization's purpose. . . ."

Such a finding cannot be made here. Obviously the only basis on which Mr. Bunk could intervene would be to protect his safety and environmental interests as they impact the legally affected geographical zone. On the present record, not a single other member can assert such interests. In fact, protection of such legal interests is admittedly not the primary purpose of the organization. That purpose is "providing education and influencing policy . . . ." In short, the inter-

[26] In the recently issued "Prehearing Conference Order Ruling on Intervention Petitions", dated January 2, 1979 and issued in *Detroit Edison Company, et al* (Enrico Fermi Atomic Power Plant, Unit 2) the ASLB conferred standing on an organization on the strength of its representation of two members residing within the geographic zone of interest. On a first reading, that order might be thought to be an application of a *per se* rule. (*See* Applicants' response of January 5, 1979, p. 9). However, on a closer analysis of the record, including the organization's petition to intervene, it becomes clear that *Fermi* involves an organization with state-wide and, possibly, interstate membership. This is in sharp contrast to the instant proceeding in which a distant local organization seeks standing on the strength of the legal interest of a single member residing within the geographic zone of interest.

[27] *See*, the list of authorities cited in Note: *Standing To Assert Constitutional Jus Tertii*, 88 HARVARD L. REV. 423, n.1 (1974).

ests that Mr. Bunk could legally assert in this proceeding are not interests which the San Antonio based organization or its other members share.

Nor can it be argued that CCANP is entitled to intervene because a hearing might serve its educational and policy influencing objectives. Whatever weight such an argument might have in another context, it can have none in an operating license proceeding such as this, where a hearing is not mandatory and is to be held only where the parties "do have a real stake in the proceeding." *Cincinnati Gas & Electric Co., et al.* (William H. Zimmer Nuclear Power Station) ALAB-305, 3 NRC 8, 12 (1976). It is clear, therefore, that Mr. Bunk's residence within the geographical zone of interest does not confer standing to intervene as of right upon CCANP.

2. *Discretionary Intervention.* Perhaps in recognition of the tenuous relationship between CCANP and any legally assertable interest in this proceeding, its representative has admitted "that the members in San Antonio are mainly asking for standing as a matter of discretion" (Tr. 73). That request cannot be granted. However earnest or admirable an interest "in providing education and influencing policy" may be, it cannot, consistent with statutory and administrative policy, trigger an operating license proceeding—or even serve as a basis for intervention in such a proceeding. Nor has CCANP met the essential test for discretionary intervention: it has not demonstrated that it is likely, as this Board phrased it in its memorandum and order of October 23, 1978, pp. 6-7, to produce "a valuable contribution to our

decision-making process." That possible contribution was analyzed in detail in the NRC Staff Response of January 8, 1979, pp. 6-9. It demonstrates that CCANP is highly unlikely to have "a substantial contribution to make on a significant safety or environmental issue appropriate for consideration at the operating license stage." *Watts Bar*, 5 NRC at 1422.

III. MARKE III CONTENTIONS

Marke II contained a list of contentions. Applicants and the Staff filed responses opposing the admission of any of them as issues to be litigated in this proceeding. (Applicants' response, pp. 17-42; Staff's response, pp. 12-25).

At the special prehearing conference, Mr. Marke was given the opportunity to clarify certain of his contentions in response to Board questions. However, the Board stated at the close of the conference that it did not wish any further submittal with respect to contentions (Tr. 196). Nonetheless, Marke III contains a "Bill of Contentions" which purports to be joint contentions of Mr. Marke individually and of ACEE. As noted below, the "Bill of Contentions" is largely a Xerox copy of Marke II contentions, but some "additional information" has been provided. Although the information is of little value, to the extent it is construed as an amendment to the contentions of Marke II, it is unauthorized and therefore untimely.

In the course of Xeroxing the contentions of Marke II for purposes of Marke III, Petitioner has interpolated, in fifteen of the contentions, fragments of statements (for the most part in the form of questions)

which, according to his cover letter, seek to answer the "what if" question posed by the Staff at the special prehearing conference. In most instances, the additional material fails to clarify — and in some cases, simply serves to confuse — the contentions. Applicants will comment specifically on only those contentions which require a response beyond that previously provided in their filing of January 5 as supplemented by the special prehearing conference presentation. For those contentions which are not specifically addressed below, the Applicants refer the Board to their January 5 response, the Staff's January 8 response, and the transcript of the special prehearing conference.[28]

[28] For the convenience of the Board, the following page references from Applicants' and Staff's responses and the transcript of the special prehearing conference are given to each of Mr. Marke's contentions:

Marke Contention	Applicants' Response	Staff Response	Transcript of Special Prehearing Conference
1	17-19	12-13	
2	19-22	13-14	101-126
3	22-23	14-15	
4	23-25	15	
5	26-27	15-16	126-136
6	27-28	16	136-144
7	29-30	17	
8	30-31	17-18	
9	31-34	18	144-148
10	35-37	19	148-160
11	23-25	19	162-167
12	23-25	19	
13	37	20	
14	38-39	20-21	167-172
15	39-40	21	172-177
16	40-41	21-22	
17	41	22	177-181
18	19-22	22	
19	41-42	23-24	
20	42	24-25	181-191
21	19-22	25	

Contention 2

Mr. Marke has added a paragraph at the end of contention 2 which refers again, in totally unsupported terms, to "falsification of QC/QA reports" and to a lawsuit filed by one Mr. Dan Swayze.

This contention was extensively discussed by both the Applicants and the Staff in their pleadings (Applicants' response, pp. 19-22; Staff's response, pp. 13-14) and at the special prehearing conference (Tr. 101-126). It was opposed by the Applicants and the Staff and nothing meriting further attention has been alleged in Marke III.

As a matter of information, the Swayze lawsuit referred to in Marke III (p. 18), involves allegations by one Dan Swayze, a former construction inspector at the STP site, that he was dismissed by Brown & Root Construction Co. as a result of his insistence on strict enforcement of quality requirements. The NRC Office of Inspection and Enforcement (Region IV) undertook an investigation of the circumstances surrounding Mr. Swayze's dismissal, finding "no items of noncompliance" and, beyond that, stating:

> . . . The allegation that the QC inspectors, as a group and individually, have been intimidated by the firing of the QC inspector for reasons of his refusing to accept construction which did not meet specifications and that they will, in the future, be reluctant to report nonconformances on construction work that does not meet specifications, was not substantiated. All QC inspectors interviewed denied that any items of nonconformance would be overlooked by them for any reasons or for fear of losing their jobs. Neither did they have any knowledge of attempts of bribery or past incidents of nonconformances having been purposely overlooked in exchange for favors. . . .[29]

[29] NRC Inspection Report No. 50-498/78-14; 50-499/78-14 dated September 13, 1978.

Contention 4

The question added by Mr. Marke to this contention relating to "abnormal" operation of STP and "plans currently in effect" is in itself an incomprehensible addition to an already vague and unspecific contention. Mr. Marke does not specify what he means by "abnormal" operation of STP nor does he explain what "plans" he refers to and how they relate to his contention. Both the Applicants and the Staff opposed the admission of this contention principally on grounds that it appeared Mr. Marke was challenging the Commission's regulations set forth in Appendix I to 10 CFR Part 50. (Applicants' response, pp. 23-25; Staff's response, p. 15). There is nothing in the pleadings or prehearing conference record to suggest that Petitioner was referring to other than releases in *normal* operation. Thus, Mr. Marke's addition is either irrelevant to Contention 4 or an attempt to change the nature of the contention to one based on unspecified accidental releases. If the latter is intended, Marke III provides no factual basis whatever to support the allegation.

Contention 5

The premise underlying the question added by Mr. Marke to Contention 5 is that the technical specifications for overpressurization occurrences are "not yet available." That is wrong. Proposed technical specifications relating to heatup and cooldown limits are in the FSAR, and the transcript of the special prehearing conference so reflects (Tr. 181).[30] For reasons discussed in the Applicants' and Staff's responses

[30] Petitioner's confusion may be related to the fact that the statement at Tr. 181 was a correction of an earlier statement (Tr. 135-36).

and at the special prehearing conference, the contention must be denied (Applicants' response, 26-27; Staff's response, 15-16; Tr. 126-136, 181).

Contention 6

The question added to Contention 6 which alleges that Applicants "seem to be involved in grave financial difficulties at the construction permit stage" merely confirms the position of Applicants and Staff that this contention lacks specificity and is purely speculative (Applicants response, pp. 27-28; Staff response, 16; Tr. 136-144).[31] Moreover, the defeat on January 20, 1979, of the ballot issue in Austin referred to in the contention (as set forth at Tr. 141) clearly demonstrates that nothing of substance supports the contention.

Contention 10

The Marke III version of Contention 10 raises a question about his "health and safety" as associated with the operation of STP during possible drought conditions. If Mr. Marke intends Contention 10 to be construed as a health and safety contention, as he apparently now does, then the short and definitive answer to his concern was provided at the special prehearing conference. There the Staff pointed out that should there be an insufficient amount of water in the cooling pond,

[31] Indeed, Mr. Marke, in explaining this contention at the special prehearing conference finally admitted that "the contention then is admittedly slightly speculative. . . ." (Tr. 140).

the plant would be required to be shut down (Tr. 157). Thus, there is no health and safety matter to litigate under Contention 10.[32]

IV. CONCLUSION

Even viewed with utmost liberality, the petitions of Mr. Marke, ACEE, and CCANP do not satisfy legal requirements. Mr. Marke has not established a personal interest cognizable in this proceeding. The petitions of the organizations do not alleviate the basic doubts as to the real party in interest and the existence of a concrete adverseness.

We urge the Board, in these circumstances, in ruling on these petitions to give careful consideration to Congressional intent as manifested in the documents underlying the 1962 amendments to the Atomic Energy Act of 1954 which eliminated the mandatory hearing on the operating license:

> At the "Radiation Safety and Regulation" hearings in June 1961 and at the 1962 regulatory hearings, there was substantial unanimity of opinion that the mandatory hearing requirement of the Act with respect to power . . . facilities should be relaxed. The second hearing on the operating license was regarded by most witnesses, as unnecessary and burdensome in the absence of bona fide intervention.

H. Rept. No. 1966, 87th Cong. 2d Sess. July 5, 1962, pp. 7-8.

The legislative history of these amendments as set forth in the Applicants' response of January 5, 1979 (pp. 48-49) is at the root of an unvarying line of NRC decisions which admonish boards to assure that both the interests and contentions of would-be intervenors in oper-

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[32] The matter is equally without substance as an environmental issue. See Applicant's response (pp. 35-36), Staff's response (p. 19) and prehearing conference transcript (Tr. 158-60).

ating license cases be carefully scrutinized to ensure that parties "do have a real stake in the proceeding." *Cincinnati Gas & Electric Co., et al.* (William H. Zimmer Nuclear Power Station) ALAB-305, 3 NRC 8, 12 (1976); see also, *Gulf States Utilities Co.* (River Bend Station Units 1 and 2) ALAB-183, 7 AEC 223, 226, n. 10 (1974). Notwithstanding the generous leeway granted by this Board to amend pleadings, none of the petitions pass this threshold test and all should be denied.

Respectfully submitted,

s/ JACK R. NEWMAN

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	
HOUSTON LIGHTING & POWER COMPANY, ET AL.	Dockets Nos. 50-498-OL 50-499-OL
(South Texas Project, Units 1 & 2)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Answer To Supplemental Information and ACEE Petition Filed by Petitioners Subsequent to Special Prehearing Conference" in the above-captioned proceeding were served on the following by deposit in the United States mail or by hand-delivery this 1st day of February, 1979:

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