UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Alan S. Rosenthal, Chairman
Dr. John H. Buck
Michael C. Farrar

SERVED APR 4 1979

In the Matter of	)	
HOUSTON LIGHTING & POWER COMPANY	)	Docket No. 50-466
(Allens Creek Nuclear Generating Station, Unit 1)	)	

Mr. Wayne E. Rentfro, Rosenberg, Texas, appellant pro se.

Mr. Jean-Claude De Bremaecker, Houston, Texas, appellant pro se.

Mr. John F. Doherty, Houston, Texas, appellant pro se.

Mr. F. H. Potthoff, III, Houston, Texas, appellant pro se.

Ms. Kathryn Hooker, Houston, Texas, appellant pro se.

Mr. Robert S. Framson and Ms. Madeline Bass Framson, Houston, Texas, appellants pro se.

Dr. David Marrack, Bellaire, Texas, appellant pro se.

Mr. Alan Vomacka, Houston, Texas, for the appellant, Houston Chapter of the National Lawyers Guild.

Mr. James M. Scott, Jr., Houston, Texas, for the petitioner for directed certification, Texas Public Interest Research Group.

Messrs. Jack R. Newman, Harold F. Reis and Robert H. Culp, Washington, D. C., and J. Gregory Copeland and Charles G. Thrash, Houston, Texas, for the applicant, Houston Lighting & Power Company.

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Mr. Stephen M. Sohinki and Ms. Colleen P. Woodhead for the Nuclear Regulatory Commission staff.

Messrs. Anthony Z. Roisman, Douglas L. Parker and Craig Iscoe, Washington, D. C., for the amici curiae, Natural Resources Defense Council and Institute for Public Representation.

DECISION

April 4, 1979

(ALAB-535)

In late 1973, the Houston Lighting and Power Company filed an application for permits to construct two boiling water reactors to be known as Allens Creek Nuclear Generating Station, Units 1 and 2. On December 28, 1973, the Commission published in the Federal Register a standard "Notice of Hearing on Application for Construction Permits". 1/ That notice of hearing specified that any interested person might file a petition for leave to intervene in the proceeding by January 28, 1974. 2/ It also set forth the issues to be considered and decided by the Licensing Board in determining whether construction permits

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1/ 38 Fed. Reg. 35521.

2/ Id. at 35522.

should be issued to the applicant.[3/]

3/ Those issues were (ibid.):

ISSUES PURSUANT TO THE ATOMIC ENERGY ACT OF 1954, AS AMENDED

1. Whether in accordance with the provisions of 10 CFR 50.35(a):

(a) The applicant has described the proposed design of the facilities including, but not limited to, the principal architectural and engineering criteria for the design, and has identified the major features or components incorporated therein for the protection of the health and safety of the public;

(b) Such further technical or design information as may be required to complete the safety analysis and which can reasonably be left for later consideration, will be supplied in the final safety analysis report;

(c) Safety features or components, if any, which require research and development have been described by the applicant and the applicant has identified, and there will be conducted a research and development program reasonably designed to resolve any safety questions associated with such features or components; and

(d) On the basis of the foregoing, there is reasonable assurance that (i) such safety questions will be satisfactorily resolved at or before the latest date stated in the application for completion of construction of the proposed facilities, and (ii) taking into consideration the site criteria contained in 10 CFR Part 100, the proposed facilities can be constructed and operated at the proposed location without undue risk to the health and safety of the public.

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The only petition to intervene was filed by the State of Texas; it was granted.[4] At the prehearing conference held by the Licensing Board on August 28, 1974, the applicant announced its intention to seek a limited work authorization and requested that an expeditious hearing be conducted on the environmental and site suitability issues which must be considered and decided in order to allow the issuance of such an authorization.[5] In accordance with the request, the Board scheduled a hearing to consider "whether or not the site proposed for the reactors is suitable from the standpoint of radiological health and safety and issues relating to environmental matters".[6]

3/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

2. Whether the applicant is technically qualified to design and construct the proposed facilities; and

3. Whether the applicant is financially qualified to design and construct the proposed facilities;

4. Whether the issuance of permits for construction of the facilities will be inimical to the common defense and security or to the health and safety of the public.

ISSUE PURSUANT TO NATIONAL ENVIRONMENTAL POLICY ACT of 1969 (NEPA)

5. Whether, in accordance with the requirements of Appendix D of 10 CFR Part 50, the construction permits should be issued as proposed.

4/ Texas later withdrew its contentions because additional information supplied by the applicant and the NRC staff resolved its concerns.

5/ See 10 CFR 50.10(e).

6/ Order dated November 14, 1974. See also order dated January 29, 1975.

An evidentiary hearing on those uncontested matters was conducted on March 11 and 12, 1975 and proposed findings were thereafter submitted by the parties. On September 26, 1975 (no initial decision having been as yet rendered), the applicant notified the Board that the construction of the Allens Creek facility was being indefinitely deferred. Despite this development, and at the urging of the applicant based upon our decision in Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-277, 1 NRC 539 (1975), the Licensing Board proceeded to issue a partial initial decision. LBP-75-66, 2 NRC 776 (1975). Itself alluding to Douglas Point, the Board undertook to make findings on various environmental and site suitability matters "in order to provide early answers to some questions and to conserve the effort that has been expended in the belief that no litigant will be prejudiced in the circumstance that the only Intervenor has withdrawn its contentions". 2 NRC at 779.[7] It concluded that:

> The matters reviewed to date, which are reflected in the foregoing findings, have demonstrated no reason why the [Allens Creek] site is not a suitable

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[7] The Board's findings included an assessment of the following:

I. Environmental Matters.

1) Impacts on land use of construction and operation of the proposed facility, primarily, withdrawal of land from agricultural use,

(FOOTNOTE CONTINUED ON NEXT PAGE)

> location for nuclear power reactors of the general size and type proposed under the requirements of the Atomic Energy Act of 1954, as amended, and Commission regulations promulgated thereunder.

Id. at 812. It went on to direct that:

> This Partial Initial Decision (as it may be subsequently modified) shall constitute a portion of the Initial Decision to be issued upon completion of the remaining environmental and site suitability matters and the radiological health and safety phase of this proceeding.

Ibid.

7/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

conformance with National Historic Preservation Act for archaeological sites, effect on flood elevations, effects on Allens Creek and the Brazos river, e.g., thermal, and introduction of effluents due to construction.

2) Environmental effects of the fuel cycle and transportation of fuel to and from the site.

3) Social and economic effects of construction and operation of the reactor, e.g., temporary and long-term increased demands on housing, schools, medical facilities, increased tax revenues and recreational uses of proposed reservoir.

4) Proposed preoperational environmental monitoring.

5) Probability of occurrence and possible environmental consequences of radiological accidents.

6) Alternatives to the proposed transmission line routes and the possible benefits of reduced land commitment through use of cooling towers instead of the reservoir.

(FOOTNOTE CONTINUED ON NEXT PAGE)

In the absence of exceptions to it, we reviewed the partial initial decision on our own initiative. In affirming that decision on December 9, 1975, we took pains to observe that "(1) the Licensing Board has not completed its environmental or safety review; and (2) even those findings already made are subject to later revision should further developments or new information so warrant". ALAB-301, 2 NRC 853, 855.

More than a year and a half later, on August 19, 1977, the applicant notified the Board that it had decided to proceed with only one of the two units and that it had amended its construction permit application to reflect that

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7/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

II. Site Suitability

1) Adequacy of engineered safety features to meet dose guideline values (10 C.F.R. Part 100) for persons within minimum exclusion distance, low population zone and population center distance.

2) Presence of nearby activities, e.g., industrial, transportation or military facilities, which must be designed against.

3) Hydrology of the proposed site.

4) Geology of the proposed site, including an extensive analysis of possible faulting and the potential for subsidence due to ground water withdrawal.

5) Atmospheric dispersion conditions at the proposed site.

fact.[8] The Board was asked to reactivate the licensing proceeding.

In the wake of this notification, the Board published a "Notice of Intervention Procedures" on May 31, 1978.[9] The notice provided that petitions to intervene could be filed with respect "to matters that have arisen because of the changes in the proposed plans for the Station".[10] Five parties sought intervention in response to that notice. The Board subsequently (on September 1, 1978) issued an amended notice for the assigned reason that the May notice had been too limited in scope. The amended notice provided that petitioners could seek intervention with regard to

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[8] The amendment was accompanied by changes in the applicant's Preliminary Safety Analysis Report. These changes included, inter alia, a reduction in gross electric generating capacity from 2400 to 1200 Mw, reflecting cancellation of Unit 2; a reduction in the number and size of associated facilities; a reduction in the size of the cooling lake from 8250 to 5120 acres (together with some alterations in its configuration); a significant reduction (almost 50%) in estimated water use requirements; and a re-design of certain effluent control systems to meet current requirements.

[9] 43 Fed.Reg. 23666.

[10] Ibid.

contentions "aris[ing] because of the changes in the proposed plans for the station and with respect to new evidence or information that had not been available prior to the * * * Appeal Board's memorandum and order of December 9, 1975 [i.e., ALAB-301]". 11/

The amended notice brought forward a substantial number of additional petitions. In all, twenty-four persons or organizations sought intervention. One of the petitioners, the Texas Public Interest Research Group, took the additional step of asking, in effect, that the Board reconsider the limitation it had imposed on the scope of contentions. On November 30, 1978, its motion for that relief was denied.

In a lengthy order issued on February 9, 1979, the Licensing Board ruled separately on all 24 of the petitions. Four were granted. For a variety of reasons, the balance of them were denied. Several were found not to have established the requisite "interest affected by the proceeding". Others failed because the Board found that the contentions asserted lacked specificity or basis or were precluded from consideration by Commission policy or regulation. One was rejected as untimely. Lastly, a number

11/ 43 Fed. Reg. 40328, 40329 (September 11, 1978). The five petitioners who had sought intervention in response to the earlier notice were notified of the expanded scope by an order dated August 14, 1978, and were given additional time to submit contentions under the altered standard.

were denied because, to the extent otherwise acceptable, the contentions stated therein neither were based upon information that became available subsequent to December 1975 nor arose from the proposed changes in the plant design.

Eight of the rejected petitioners have appealed the Licensing Board's decision. The applicant urges affirmance on each appeal; the staff supports some but not all of the appeals.

In addition, one of the four successful petitioners, the Texas Public Interest Research Group, seeks interlocutory review by way of directed certification of the limitation imposed by the Licensing Board in the September 1 amended notice. Although admitting that organization to the proceeding, the Board invoked that limitation in rejecting a number of its contentions. Both the applicant and the staff oppose the grant of the sought relief on the dual grounds (1) that no showing was made of extraordinary circumstances warranting interlocutory review; and (2) that, in any event, the limitation was correct.

I.

One of the appeals before us involves the denial in the February 9 order of the intervention petition of John F. Doherty. On March 19, 1979, subsequent to the filing of that appeal, the Licensing Board issued an order in which, for reasons not germane here, it granted intervention to Mr. Doherty. In view of this development, the applicant has moved to dismiss the appeal as moot.

It is settled that, under the Commission's Rules of Practice, a petitioner for intervention may not pursue an interlocutory appeal from Licensing Board action in connection with his petition unless that action constituted an outright denial of the petition. 10 CFR 2.714a, 2.730(f); Puerto Rico Water Resources Authority (North Coast Nuclear Plant, Unit 1), ALAB-286, 2 NRC 213 (1975). Thus, even though, in recently granting intervention, the Licensing Board did not overturn its prior rejection of the Doherty contentions then considered, his appeal from that rejection will no longer lie. Ibid. It must therefore be dismissed.

It appears, however, that the test applied by the Licensing Board in ruling certain of the Doherty contentions inadmissible was the same as that invoked by the Board for a like ruling on some of the contentions of other petitioners,

whose appeals remain alive before us. We consider those appeals in Part II, infra. For the reasons developed there, we have concluded that the test is not acceptable and are calling upon the Board to reexamine each contention rejected on the basis of it. In the interest of avoiding a possible reversal of the eventual initial decision (should Mr. Doherty then exercise his right to press the claims raised by his now aborted appeal), the Licensing Board doubtless will wish to pursue the same course with respect to the Doherty contentions, as well as to provide him with the same reasonable opportunity to amend his petition that is being accorded to those other petitioners. See pp. 18-19 and fn. 16, infra.

II.

For want of an admissible contention, the Licensing Board similarly denied the petitions to intervene of appellants Wayne E. Rentfro, Jean-Claude De Bremaecker, Madeline B. and Robert S. Framson, Kathryn Hooker, F. H. Potthoff, III and David Marrack. We have scrutinized the grounds assigned by the Board for its ruling on each rejected contention, together with the arguments advanced before us either in opposition to or in support of the ruling. In the instance of Mr. De Bremaecker and Ms. Hooker, we find no error warranting reversal and, accordingly, affirm the denial of intervention to them. With regard to the other appellants in this group, however, further Licensing Board consideration of their petitions is required.

A. As we have seen, in inviting the submission of new intervention petitions once the applicant had asked in 1977 that the construction permit proceeding be resumed, the Licensing Board put severe limitations upon the contentions that could be raised in any such petition. More particularly, the amended notice of "intervention procedures" issued by the Board in September 1978 decreed that any contentions put forth by a petitioner had either to arise from proposed changes in plant design or to be based upon "new" evidence or information; i.e., information that had not been available prior to our December 9, 1975 affirmance (in ALAB-301) of the partial initial decision of the Licensing Board.

Thus, by the terms of the notice, the Board was foreclosing (absent plant design changes or newly available information) the raising even of safety and environmental issues which had been neither considered in depth (if at all) at the uncontested two-day evidentiary hearing in March 1975 nor addressed in the partial initial decision issued in November of that year. Needless to say, there are many potential issues falling in that category. The 1975 hearing was not convened for the purpose of hearing all safety issues. Rather, in the safety area, focus was upon those matters which needed to be resolved as a precondition to the issuance of the limited work authorization which, at the time, the applicant was still seeking (i.e., those issues relating to the suitability of the proposed site "for a reactor of the general size and type proposed from the standpoint of radiological health and safety considerations * * *" (10 CFR 10.50(e)(2)). Moreover, although a full environmental review must precede a limited work authorization (ibid.), it is equally plain that the partial initial decision did not come to grips with all of the issues required to be examined by reason of NEPA. To the contrary, the Board itself stressed that the partial decision was but a portion of the initial decision "to be issued upon completion of the remaining environmental and site suitability matters

and the radiological health and safety phase of this proceeding Still further, although the Licensing Board may not have been aware of it, it now appears that the staff initiated a study late last year for the purpose of reexamining its prior conclusions (set forth in a 1974 Final Environmental Statement) respecting how the Allens Creek site compares with potential alternative sites. The staff's brief to us detailed the nature of the study (at pp. 31-35) and informed us that, when completed, the analysis and conclusions derived therefrom would be submitted to the Licensing Board in the form of supplemental testimony. It is therefore evident that the alternative site question -- one of the most potentially significant of all of the environmental matters which need be explored in a licensing proceeding -- remains wide open.

In the totality of these circumstances, we are persuaded that the amended notice issued in September 1978, in common with the predecessor notice of "intervention procedures" issued three months earlier (see p. 8, supra), was too restrictive. No doubt, the Board quite properly placed a limitation upon the relitigation by a new intervenor of issues which had been thoroughly explored at the 1975 hearing and dealt with in the partial initial decision. In the absence of newly discovered evidence or a material change

in circumstances, there is every reason why a party should not be permitted to reopen an issue which was fully considered and settled at an earlier time. But we perceive inadequate justification for treating as beyond the scope of permissible present inquiry an issue which got no or scant attention at the earlier hearing and/or which the Licensing Board itself believed to be left open by the partial initial decision.

Our Douglas Point decision, ALAB-277, supra, assuredly does not provide any such justification.[12/] The question there posed was whether a Licensing Board should move forward with a construction permit proceeding in circumstances where the applicant for the permit had disclosed an intent to postpone construction for several years. That Board had answered that question in the negative; in its view, it was legally required to defer further consideration of all issues in the proceeding until such time as the applicant manifested a desire to commence construction of the facility. We saw it differently. Discerning no legal impediment "to an early scrutiny of any of the issues which must be resolved before the ultimate licensing action is taken" (1 NRC at 544), we

12/ Once again, Douglas Point was the foundation of the Licensing Board's determination to render a partial initial decision on site-related issues notwithstanding the fact that, at the time, the construction of Allens Creek had been deferred indefinitely. See LBP-75-66, supra, 2 NRC at 779; ALAB-301, supra, 2 NRC at 854.

went on to determine that such scrutiny of at least some of those issues might well serve the interests of all concerned. Id. at 545-47. We had in mind particularly those issues as to which (1) there was a high degree of likelihood that any early findings would retain their validity; and (2) early resolution (even if not necessarily conclusive) would provide the parties with a timely indication of whether, for example, the site met applicable safety standards and was environmentally acceptable as well. Ibid.

In connection with these determinations, we did convey the message that any early findings would be open to reconsideration only if "supervening developments or newly available evidence so warrant". Id. at 545, 552-53.[13/] But we did not go on to imply, let alone hold, that the Licensing Board might later impose a similar limitation on the right to raise issues which were not encompassed by the early findings. Had we thought that result would be permissible, we would have said so expressly. Beyond that, we would have been called upon to supply an explanation. As is readily apparent from even a cursory reading of ALAB-277, the rationale underlying what was there decided not only is devoid of any such explanation but, if anything, undercuts the notion that early hearings and findings on some issues

13/ The same message was conveyed when we reviewed in ALAB-301 the partial initial decision in this case. See p. 7, supra.

can control the treatment of other issues when, at a much later date, the proceeding is resumed.

In sum, we hold that no contention advanced by the appellants could properly be rejected simply because it did not arise from proposed plant design changes and was not based upon either new evidence or information unavailable prior to December 1975. Rather, it would also have to appear that the contention was addressed to matters heard in March 1975 and decided in the November 1975 partial initial decision. To the extent inconsistent with this holding, the September 1, 1978 amended notice of "intervention procedures" placed an unwarranted limitation upon the right to intervene and, accordingly, could not lawfully be invoked in passing upon appellants' intervention petitions.

B. At least one of the contentions of Mr. Rentfro, the Framsons, Mr. Potthoff and Dr. Marrack appears to have been rejected on the strength of the improper restriction contained in the amended notice. This being so, we are constrained to remand their petitions to the Licensing Board for further evaluation of the contentions so rejected in light of the views we have just expressed.[14/] The Board shall then take

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14/ Insofar as concerns the remainder of the contentions of these appellants, we have found no Licensing Board error warranting reversal. See, however, fn. 16, infra, indicating that further action may have to be taken in regard to some of them.

such action on the petitions as may be appropriate in light of the conclusions reached on the reevaluation.[15/] Before taking that action, each of those four petitioners must be accorded a reasonable opportunity to amend his or their petitions to assert any additional contentions that might have been advanced had not the Licensing Board imposed the erroneous limitation. On the basis of what is before us, we cannot exclude the possibility that the limitation had an inhibiting effect upon their selection of the contentions to be put forth in their petitions.[16/]

15/ We appreciate that the Board below had other criticisms of the single contention of Mr. Potthoff which was rejected as not based upon new evidence or information. See February 9 order at p. 68. It is not clear, however, whether those criticisms were intended to represent an alternative ground for rejection of the contention.

16/ There is one additional matter that need be considered. In their appellate papers, the Framsons repeated the assertion that they (and others) made below, to the effect that the Licensing Board gave them too little time to formalize their contentions. Specifically, they complain that that Board's order of October 24, 1978 setting a prehearing conference for November 17, 1978 created an unfair situation. This resulted, they point out, because under the Rules of Practice (10 CFR 2.714(b), as amended effective May 26, 1978, 43 Fed. Reg. 17798 (April 26, 1978)) contentions must be filed 15 days before such a conference (in this instance, by November 2). But, they say, by the time the Board's notice reached them (around October 28), the time was too short to prepare the contentions in adequate form.

The Framsons' argument points up an obvious gap in the Rules. We recognize that a petitioner can and should
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III.

At this point, it is appropriate to turn to the petition for directed certification filed under 10 CFR 2.718(i) by the Texas Public Interest Research Group (TEX-PIRG). That petition in essence asks us to decide, in the context of the Licensing Board's rejection of a number of its contentions, the question which we have just addressed in Part II, supra.[17/] There is no need to do so. We are

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16/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)
use the period following the filing of his petition to gather the material and do the analysis necessary to prepare adequate contentions. But the Rules might well provide that petitioners be given more advance warning that the final bell is about to sound than was done here. In the absence of such a provision, we have only a vague due process standard to guide us.

We note that the argument presented here is not a purely academic one. Several of the contentions advanced by the now successful appellants were rejected because they were vague or lacked sufficient articulated basis. In this circumstance, we can insure that any possible injustice that might have been done is corrected -- by allowing any of the successful appellants who were so affected to attempt to rehabilitate the contentions that were rejected for such reasons. No delay will be occasioned by their salvage efforts, for they can utilize for that purpose the same time period to which we have already held them entitled in order to avoid the effect of the improper limitations on subject matter previously imposed upon them (see p. 19, supra).

17/ Because TEX-PIRG was granted intervention, it could not take an appeal now from the rejection of those contentions. See p. 11, supra. A petition for directed certification is a permissible vehicle for
(FOOTNOTE CONTINUED ON NEXT PAGE)

confident that, as we have suggested be done in the case of the Doherty contentions (see p. 12, supra), the Licensing Board will promptly reexamine its rulings on TEX-PIRG contentions in light of the conclusions we reached in Part II; and, as well, provide that organization with the same opportunity to amend its petition as has been accorded to the four successful appellants (see p. 19 and fn. 16, supra).[18]

17/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE) seeking our interlocutory review of licensing board rulings. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478 (1975). The grant of such petitions is discretionary, however, and we exercise that discretion sparingly. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-504, 8 NRC 406, 410 (1978).

18/ The Natural Resources Defense Council filed a motion for leave to file an amicus curiae brief in support of the petition for directed certification. The motion is denied and the brief which accompanied it is therefore not accepted for filing.

IV.

Unlike the other appellants, the Houston Chapter of the National Lawyers Guild (Guild) was denied intervention on the ground that it had failed to establish its standing. Order, pp. 61-63.[19] The Licensing Board reached this conclusion because of the deliberate refusal of the Guild to identify by name and address any of its members whose interests might be affected by the outcome of the proceeding within the meaning of 10 CFR 2.714(a).

The reason assigned by the Guild for the refusal was that it was legally required to do no more than allege in its petition (as it did) that it "has more than fifty (50) members who reside in [certain Texas counties] in close proximity to the proposed nuclear power plant". In this connection, the Guild insisted that a more precise identification of those members would occasion an invasion of

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19/ The Licensing Board also determined (order, pp. 63-65) that there was insufficient warrant for permitting intervention as a matter of discretion under the teachings of Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976). The Guild's appeal does not challenge that determination but, rather, is confined to the standing (i.e., intervention as a matter of right) issue. Because appeal boards do not engage in review sua sponte of licensing board rulings on intervention matters, we will similarly restrict our consideration here to the controversy over the Guild's standing.

their privacy and subject them to the surveillance, intelligence gathering and security activities of this Commission, the applicant and Texas law enforcement authorities. The Licensing Board found this explanation unacceptable. It reasoned that, absent the information which the Guild had declined to furnish, it could not determine whether the organization actually does represent members who consider that they will be affected by the issuance of a construction permit for Allens Creek or rather, was simply seeking the "vindication of its own value preference". Order, p. 63.

The Guild's two-page appellate brief is largely a repetition of its invasion of privacy claim. There appears to be some suggestion, however, that the Guild has standing of its own by virtue of the proximity to the proposed facility of its "residence" (in Houston, approximately 45 miles east of the Allens Creek site). In addition, we have before us a brief amici curiae submitted by the Natural Resources Defense Council and the Institute for Public Representation, in which the Guild's position is supported at much greater length and with considerably

more analysis.[20/] For their part, both the applicant and the staff urge affirmance.

A. The starting point in the consideration of the Guild's appeal is that, contrary to its seeming belief, organizations of its stripe are not clothed with independent standing to intervene in NRC licensing proceedings. Rather, any standing which the Guild may possess is wholly derivative in character. It must appear that at least one of the persons it purports to represent does in fact have an interest which might be affected by the licensing action being sought; here, the issuance of a construction permit for the Allens Creek facility.

This point was settled in our decision several years ago in Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420 (1976). Barnwell was a proceeding on an application for a materials license to receive and store irradiated fuel assemblies at a facility in South Carolina. A petition for leave to intervene in the proceeding was filed by the American Civil Liberties Union of South Carolina (ACLU/SC). The petition

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20/ The brief amici was lodged together with a motion for leave to file it. Although deciding to accept the brief, we chose not to call for responses. Nonetheless, the applicant filed a response, which we have fully considered.

was founded largely upon that organization's asserted concern with, and "unique qualifications" to address, the "civil liberties issues" which it sought to raise. The Licensing Board concluded that allegations of that sort were insufficient to establish standing. LBP-76-12, 3 NRC 277, 286 (1976). We agreed and, on a finding that the petition lacked a particularization of how the interests of one or more members of the ACLU/SC might be affected by the issuance of the sought materials license,[21/] affirmed the denial of intervention. 3 NRC at 421-23. Our action rested squarely on the teachings of Sierra Club v. Morton, 405 U.S. 727 (1972), in which the Supreme Court had held that the Sierra Club could not predicate its standing to seek to enjoin federal agency approval of the commercial development of a portion of a national game refuge adjacent to the Sequoia National Park upon its asserted "special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country". As we observed, the basis for that holding was that,

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21/ It should be noted that the ACLU/SC, in contrast to the Guild here, had supplied an affidavit executed by one of its members who resided relatively close to the Barnwell facility. That affidavit had not, however, specified the injury which the member thought she might sustain as a result of the grant of the license application.

although an organization whose members are injured may represent those members in a proceeding for judicial review,

> * * * a mere "interest in a problem," no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization "adversely affected" or "aggrieved" within the meaning of the APA. The Sierra Club is a large and long-established organization, with a historic commitment to the cause of protecting our Nation's natural heritage from man's depredations. But if a "special interest" in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide "special interest" organization, however small or short-lived. And if any group with a bona fide "special interest" could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so.
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> The requirement that a party seeking review must allege facts showing that he is himself adversely affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through the judicial process. It does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome. That goal would be undermined were we to construe the APA to authorize judicial review at the behest of organizations or individuals who seek to do no more than vindicate their own value preferences through the judicial process. The principle that the Sierra Club would have us establish in this case would do just that.

405 U.S. at 739-40; footnotes omitted.

B. 1. It is patent from the foregoing that, in determining the Guild's standing, the Licensing Board was not merely entitled but obligated to satisfy itself that there was at least one member of the Guild with a particularized interest which might be affected by the outcome of the proceeding (in the context of the Guild petition, the issuance of a construction permit for Allens Creek). The question thus becomes whether, in discharging that obligation, the Board lacked the right to insist that there be a specific identification of the member or members upon whose interest the assertion of representational standing necessarily was bottomed. Put another way, was the Board required to presume that the Guild had a member with the requisite affected interest on the strength of nothing more than the naked representation in its petition that a certain number of Guild members reside within "close proximity" to the site of the proposed facility?

Laying to one side the right of privacy claim,[22/] we think that question requires a negative answer. According to its petition, the Guild is "a voluntary association of over 5,000 lawyers, law students, legal workers and jailhouse lawyers * * * which is dedicated to the need for

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22/ That claim will be discussed later. See pp. 39-47, infra.

basic change in the structure of our political and economic system". Although it may be reasonable to suppose that most (perhaps all) Guild members share that dedication as well as subscribe to the general objectives of the organization as spelled out in the petition, [23/] it scarcely follows perforce that each considers that construction of the Allens Creek facility would invade some personal interest "arguably within the zone of interests sought to be protected or regulated" by either the statutes this Commission enforces or the Constitution. Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 153 (1970); Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613 (1976). Insofar as we are aware, joining and retaining membership in the Guild does not signify adherence to any particular views regarding the desirability of nuclear power facilities,

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23/ a. To aid in making the United States and the State Constitutions, the law and the administrative and judicial agencies of the government responsive to the will of the American people;

b. To protect and foster our democratic institutions and the civil rights and liberties of all the people;

c. To promote justice in the administration of the law;

d. To keep the people informed upon legal matters affecting the public interest;

e. To encourage, in the study of the law, a consideration of the social and economic aspects of the law.

either from a civil liberties standpoint or otherwise. Nor, more importantly, does there appear to be any necessary link between holding Guild membership and possessing an interest which might be affected by the construction or operation of such a facility. Indeed, for all that appears on this record, the personal interests of any particular Guild member might be advanced, rather than harmed, by the construction of Allens Creek -- i.e., the proposed licensing action would cause the member no injury in fact at all.

The alleged fact that there are Guild members who live in the general vicinity of the Allens Creek site does not alter matters. To be sure, persons who live in close proximity to a reactor site are presumed to have a cognizable interest in licensing proceedings involving that reactor. Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC ___, ___ (January 26, 1979). But there is no like presumption that every individual so situated will deem himself potentially aggrieved by the outcome of the proceeding (an essential ingredient of standing). Some may and some may not. Because of this consideration, the petitioner organization in North Anna did not and could not content itself with the simple assertion that it had members living in the shadow of the

facility there in question. To establish its representational standing, it additionally supplied the statement of one of those members, which explicitly identified the nature of the invasion of her personal interest which might flow from the proposed licensing action.[24/]

But even if an organization's standing could be founded on nothing more than its having members residing in close proximity to the facility site, the Guild's position would not be improved. Absent disclosure of the name and address of one such member, it is not possible to verify the assertion that such members exist. In a footnote in their brief, the amici curiae endeavor to brush this consideration aside by noting that the veracity of the Guild's allegation that it has nearby members has never been challenged and, were it to be, the Board below could require a Guild officer to submit an affidavit attesting to the truthfulness of the allegation. What this line of reasoning ignores is that both the Board and the other parties were entitled to be provided with sufficient information to enable them to determine for themselves, by independent

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24/ The member also confirmed that she had authorized the organization to represent that interest. We discuss below whether such an authorization is required. See pp. 33-39, infra.

inquiry if thought warranted, whether a basis existed for a formal challenge to the truthfulness of the assertions in the Guild's petition. Beyond that, we are unprepared to accept amici's implicit thesis that standing may be established by means of an affidavit which makes conclusionary assertions not susceptible of verification by either other litigants or the adjudicatory tribunal. We know of no authority for such a novel and unattractive proposition, which to us runs counter to fundamental concepts of procedural due process.

In sum, in circumstances where (as here) an organization's entitlement to intervene is wholly dependent upon the personal standing of at least one of its members, there is every justification for insisting that the membe. be identified specifically. Such insistence does not, as amici would have it, engraft new requirements for organizational standing upon those now enforced by the federal courts. Rather, it is a matter of obtaining the necessary assurance that one of the established requirements is met; namely, that the members of the organization "would otherwise have standing to sue in their own right". Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977). At the risk of undue repetition, the indisputable fact is that, without the disclosure which the Guild

declined to make, the petition contained an inadequate averment of facts necessary to allow an informed determination that, in actuality, that organization does possess a member with the requisite personal standing.

It is true (as amici stress) that, in Hunt, the Supreme Court did not refer specifically to an obligation to disclose the names of individual members. On the facts of that case, however, any such reference would have been entirely superfluous. Hunt involved a suit brought by a Washington State Commission seeking to invalidate a North Carolina statute regulating the labeling of closed containers of apples sold in, offered for sale in or shipped into North Carolina. The Commission had been created by the Washington legislature for the express purpose of promoting and protecting that State's apple industry, which accounted for nearly one-half of all apples shipped in closed containers in interstate commerce. It was comprised of thirteen Washington apple growers and dealers, elected by their fellow growers and dealers. Its activities were financed by assessments levied against the entire industry.

In these circumstances, there would have been no room for any claim (and none was made) that the Commission's assertion of standing was defective for want of an identification of a specific grower or dealer with the requisite

personal interest in the outcome of the suit. By legislative decree, the Commission served as the representative of all growers and dealers within the State. Further, it was manifest on the face of things that the North Carolina statute under attack adversely affected the economic interests of the entire industry. In the words of the Supreme Court, it had the "obvious consequence" of "prohibiting the display of Washington State apple grades on containers of apples shipped into North Carolina" and, accordingly, "presented the Washington apple industry with a marketing problem of potentially nationwide significance". 432 U.S. at 337. All this being so, it is hardly surprising that the North Carolina challenge to the Commission's standing (and the Court's resolution of the challenge) focused upon issues quite different than that with which we are confronted here; e.g., North Carolina's assertion that the Commission was not a proper representative of apple industry interests. Id. at 342.

2. In light of the Guild's steadfast refusal to reveal the name and address of at least one of its members with personal standing, it was unnecessary for the Licensing Board to reach the additional question as to whether, as was done in North Anna (see fn. 24, supra), that member

must expressly have authorized the organization to represent his interest. The amici point, however, to the statement in the order below (at p. 63) that the Guild had failed to allege facts "showing that it actually represents named members who reside at certain distances from the proposed plant and who claim they will be adversely affected by the granting of the construction permit". We are then told by the amici that, if this was intended to constitute a holding that an authorization is required, the Board was in error.

We are normally reluctant to reach questions that need not be decided in the particular case at bar. In this instance, however, the authorization issue appears to be of sufficient potential recurring importance that there is reason to settle it now. We accordingly do so.

At the outset, it is important to understand precisely what the member would be called upon to authorize and for what purpose. From amici's argument, one might deduce that the issue is whether, in order to file an intervention petition, the organization perforce would be required to obtain the prior approval of one, or perhaps a majority, of its members. Indeed, amici goes so far as to suggest

that what is in question is not merely whether permission to seek intervention is needed but, as well, whether the member or members' approval likewise would have to be obtained with respect to litigation strategy, settlement, the prosecution of appeals and the like.

If the amici were right in their formulation of the question, we would have little difficulty in accepting its answer to it. Beyond doubt, it is for an organization to determine for itself, in accordance with whatever procedures it may have developed for doing so, whether it will bring suit (or intervene in an administrative proceeding) on its members' behalf. So too, it is the right of the organization and its counsel, again in conformity with its own established internal procedures, to conduct litigation to which it has become a party as it sees fit. As the amici correctly observe, the member who is dissatisfied with the decision of the organization to seek (or not to seek) intervention, or with the course which the organization pursues in representing his interests, is free to resign.

But all this is a straw man here. No one, least of all the Licensing Board, has suggested that a member with a personal affected interest in the proceeding must have

authorized the filing of the intervention petition in order to establish that the officer of (or attorney for) the organization who signed the petition was acting within the scope of his authority. More specifically, there has never been an intimation of ultra vires conduct on the part of the Guild in this proceeding; had there been, the appropriate and total response would have been a demonstration that the decision to file the petition had been arrived at in a manner consistent with the Guild's internal procedures. The authorization at issue is, instead, addressed to the organization's standing to intervene. What the member would be called upon to do is to confirm not that he had directed or approved the filing of an intervention petition but, rather, that he had authorized the organization to represent his interests in the proceeding and thus had clothed it with his personal standing (which then could serve as the footing for the organization's standing to seek intervention if so inclined).

When properly viewed, then, the authorization issue takes on a cast materially different from that which the amici endeavor to place upon it. That is, it relates to the organization's obligation to establish its standing to intervene -- and not to its right to manage its own

affairs in accordance with its own procedures. Where an organization's standing hinges upon its being the representative of a member who has the requisite affected personal interest, it is obviously important that there be some concrete indication that, in fact, the member wishes to have that interest represented in the proceeding. As we see it, unless an organization's charter provides to the contrary, mere membership in it does not ordinarily constitute blanket authorization for the organization to represent any of the member's personal interests it cares to without his or her consent. In the context of the matter at hand, what possible foundation would exist for the Guild's standing were none of its members with a personal affected interest desirous of having that interest pursued?

This does not mean that, in the case of all organizations, there need be supplied a specific representational authorization of a member with personal standing. To the contrary, in some instances the authorization might be presumed. For example, such a presumption could well be appropriate where it appeared that the sole or primary purpose of the petitioner organization was to oppose nuclear power in general or the facility at bar in particular. In

such a situation, it might be reasonably inferred that, by joining the organization, the members were implicitly authorizing it to represent any personal interests which might be affected by the proceeding.[25/]

No similar inference, however, would be possible with respect to the Guild in this instance. By its own admission, that organization was not formed for the specific purpose of advancing opposition to nuclear power in general or the Allens Creek facility in particular; nor is there anything in its articulated objectives (see p. 28, supra) which might lead one to conclude that, by acquiring membership in the Guild, a person was perforce authorizing it to represent whatever interest he might have with regard to a proposed nuclear power plant. Accordingly, even had the

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25/ For different reasons, no specific authorization would have been necessary in Hunt v. Washington State Apple Advertising Comm'n, supra. As earlier noted, by operation of Washington law the State Commission was authorized to represent the precise economic interests of apple growers and dealers which were sought to be vindicated in the suit against North Carolina. Moreover, the members of the Commission who authorized the filing of the suit were themselves clothed with personal standing.

We attach no special significance (as does the amici) to the absence of any mention of a representational authorization requirement in Sierra Club v. Morton, supra, or Warth v. Seldin, 422 U.S. 490 (1975). The issue was apparently not raised in those cases and we perceive nothing in either decision which constitutes either an express or implicit holding on it.

Guild disclosed the name of a member who possessed a sufficient personal interest (i.e., standing) to enable his intervention in the proceeding, it would have been open to the Licensing Board to require a showing that the member had authorized the organization to represent that interest.

C. What is left for consideration is whether, as both the Guild and the amici maintain, the disclosure requirement contravenes a constitutional right of association (or, as the Guild puts it, the "right to privacy in group association"). In support of the claim that it does, we have been referred to NAACP v. Alabama, 357 U.S. 449 (1958).

In that case, the State of Alabama had brought a state court action in 1956 against the National Association for the Advancement of Colored People seeking to enjoin it from conducting further activities in that State. The bill in equity charged, inter alia, that, without satisfying the Alabama statutory requirement that a foreign corporation qualify before doing business in the State, "the Association * * * had organized various affiliates in Alabama; had recruited members and solicited contributions within the State; had given financial support and furnished legal assistance to Negro students seeking admission to

the state university; and had supported a Negro boycott of the bus lines in Montgomery to compel the seating of passengers without regard to race". 357 U.S. at 452. Asserting various defenses, the NAACP filed a demurrer. Thereupon, "the State moved for the production of a large number of the Association's records and papers, including bank statements, leases, deeds, and records containing the names and addresses of all Alabama 'members' and 'agents' of the Association". Id. at 453. According to Alabama, this information was necessary to defend against the NAACP's denial that it was conducting an intrastate business within the meaning of the qualification statute. The court ordered production and, upon the NAACP's refusal to comply, held it in contempt.

Before the Supreme Court, the NAACP did not claim that, in any and all circumstances, a requirement that an organization disclose the names of its members abrogates constitutional guarantees. Rather, as characterized by the Court, its argument was that "in view of the facts and circumstances shown in the record, the effect of compelled disclosure of the membership lists will be to abridge the rights of its rank-and-file members to engage in lawful

association in support of their beliefs". Thus, the argument proceeded, "governmental action which, although not directly suppressing association, nevertheless carries this consequence, can be justified only upon some overriding valid interest". Id. at 460 (emphasis supplied).

It was this proposition -- and not the much broader one which the Guild and amici seemingly press upon us[26/] -- which the Court accepted in overturning the production order:

> We think that the production order, in the respects here drawn in question, must be regarded as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association. Petitioner has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. Under these circumstances, we think it apparent that

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26/ For example, the amici assert (Br. p. 14) that "[t]he only exception to the prohibition against involuntary disclosure [of members' names] occurs when there is a demonstration of a compelling state interest in disclosure that outweighs the injury suffered by the persons who are denied the right of association". In relying upon NAACP for that proposition, the amici at least implicitly suggest that the Court held that involuntary disclosure perforce involves an invasion of the right of association.

> compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.

Id. at 462-63 (emphasis supplied).[27/]

The contrast between the situation confronting the Supreme Court and that here is so stark that we have not the slightest hesitance in concluding that the Licensing Board's order raises no colorable constitutional issue. With all due regard for the intensity of the controversy attendant upon this country's resort to nuclear power, it is at best doubtful that its climate can be equated to that which engulfed the struggle for racial justice in the South during the late 1950s.

Be that as it may, there plainly is no parallel between what was being sought in NAACP v. Alabama for no

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27/ The Court went on to determine that the State had not shown a substantial enough interest in obtaining the names of ordinary NAACP members to overcome the Association's constitutional objections. 357 U.S. at 465.

good purpose[28/] -- the names of every Association member in the entire State -- and what was being sought here for a perfectly legitimate reason -- the name of a single Guild member with a personal interest in this proceeding. Another important -- and equally dispositive -- distinction between that case and this one is the Guild did not even attempt to make a concrete demonstration that its members have been subjected in the past, or are likely to be subjected in the future should their identities be disclosed, to anything remotely approaching the kind of treatment that identified NAACP members were shown to have encountered. All that the Guild has supplied are broad, vague and essentially unsupported allegations that known opponents of nuclear power have been and will continue to be the victims of illegal harassment of various types at the hands of utilities and governmental agencies.[29/]

28/ As the Supreme Court observed:

> The issues in the litigation commenced by Alabama by its bill in equity were whether the character of petitioner and its activities in Alabama had been such as to make petitioner subject to the registration statute, and whether the extent of petitioner's activities without qualifying suggested its permanent ouster from the State. Without intimating the slightest view upon the merits of these issues, we are unable to perceive that the disclosure of the names of petitioner's rank-and-file members has a substantial bearing on either of them.

357 U.S. at 464.

29/ The Guild does not assert that, for reasons having nothing to do with opposition to nuclear power plants, its members might be harassed by these agencies were their identity known.

If anything, the Guild might have been expected to make a more particularized showing of potential harassment than that which had been made by the NAACP. The events on the racial front in Alabama at the time, and their implications with regard to members of such organizations as the NAACP, were matters of common knowledge. The same cannot be said respecting the ingredients of the Guild's claim. Indeed, the objective indicia within our ken belie its insistence that, if identified, its members would suffer the consequences it describes.

Specifically, we can take official notice that the overwhelming majority of the organizations which have petitioned for leave to intervene in NRC licensing proceedings over the years have manifested no reluctance to disclose the name(s) of the member(s) upon whom they were relying for representational standing to oppose the facility.[30/] If any of those members paid a heavy price -- or any price at all -- because of that disclosure, we are not aware of

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30/ We cannot accept the suggestion that there has been no custom or practice of providing such names. Our experience in the licensing process is to the contrary. And that the names serve a useful purpose is borne out by the recent licensing board decision in Washington Public Power Supply System (WPPSS Unit 2), LBP-79-7, 9 NRC ___ (March 6, 1979).

it and it has not been documented by the Guild. Nor is there apparent reason to think that an unusual situation may obtain in the State of Texas. In two other proceedings likewise involving Texas reactors, intervention petitions very recently filed by organizations were accompanied by affidavits which disclosed the names and addresses of rank-and-file members who had not themselves signed the petition.[31/]

In short, the record before us provides an insufficient factual foundation on which to base a finding that enforcement of the disclosure requirement here would invade the right of association of Guild members within the meaning of NAACP v. Alabama. That conclusion is dispositive of the appeal before us. Nonetheless, there is warrant to provide guidance to the licensing boards respecting the treatment of any similar claims which, in future cases, might be advanced with much stronger underlying support.

Upon a determination that an adequate showing has been made that public revelation of the identity of a member of the petitioner organization might threaten rights

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31/ Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), Docket Nos. 50-498, 499 (amended petition of Citizens Concerned About Nuclear Power, dated December 25, 1978); Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), Docket Nos. 50-445, 446 (petition of Citizens Association for Sound Energy, dated February 28, 1979).

of association, the licensing board should place a protective order upon that information. The order should provide that the information need be supplied only to the members of the Board and one or more designated representatives of the other parties to the proceeding. Additionally, it should prohibit further dissemination of the information to anyone (other than a member of a reviewing tribunal).

The issuance and observance of a protective order along those lines would both safeguard the identified members' right of association and enable the Board and the parties to satisfy themselves that the organization's claim of standing is bona fide. It need be added only that this Commission and its adjudicatory boards have always proceeded on the assumption that the terms of all protective orders will be scrupulously observed by everyone who acquires confidential information under such an order. Were it not for that assumption, we would of course have been hard put to justify our holding two years ago in Diablo Canyon[32/] that, in certain circumstances, intervenors are entitled

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32/ Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398 (1977).

to receive access, under protective order, to facility physical security plans -- most sensitive documents indeed.

For the reasons stated, the Licensing Board correctly denied the Guild's petition for want of an adequate demonstration of standing.

V.

On the basis of the foregoing determinations:

1. So much of the February 9, 1979 order of the Licensing Board as denied the intervention petitions of appellants De Bremaecker, Hooker and the Houston Chapter of the National Lawyers Guild is affirmed.

2. So much of that order as denied the intervention petitions of appellants Rentfro, Framson, Potthoff and Marrack is vacated and the cause is remanded to the Licensing Board for further proceedings consistent with the views expressed in Part II of this opinion, pp. 13-19, supra.

3. The appeal of John F. Doherty is dismissed as moot, but the Licensing Board is encouraged to reconsider in the light of Part II, supra, its treatment of his intervention petition.

4. The petition for directed certification filed by the Texas Public Interest Research Group is denied on the understanding that, on its own initiative, the Licensing Board also will reconsider in the light of Part II, supra, its treatment of that organization's intervention petition.

It is so ORDERED.

FOR THE APPEAL BOARD

Margaret E. Du Flo

Margaret E. Du Flo
Secretary to the
Appeal Board