



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

APPLICANT'S RESPONSE TO BRIEF AMICUS CURIAE OF  
NATURAL RESOURCES DEFENSE COUNCIL AND INSTITUTE  
FOR PUBLIC REPRESENTATION IN SUPPORT OF APPEAL  
OF THE NATIONAL LAWYERS GUILD

I. INTRODUCTION

Applicant files this response to the brief amicus curiae of the Natural Resources Defense Council (NRDC) and Institute for Public Representation (INSPIRE) in support of the appeal of the Houston Chapter of the National Lawyers Guild (NLG) in this proceeding.

II. BASIC AUTHORITY

This response is brief because Applicant has no quarrel as to the scope of the relevant case law as cited in the amicus brief. NRDC-INSPIRE have stated correctly that in determining questions of interest or standing, NRC boards are to apply "contemporaneous judicial concepts of standing."

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The cases they cite <sup>1/</sup> as representative of those "concepts" are, in fact, the body of controlling authority. <sup>2/</sup>

Sierra Club v. Morton, establishes a two-fold standing test which later cases have construed and refined: (1) the action challenged must give rise to an injury within the "zone of interests" sought to be protected by the statute or regulation involved; and (2) this injury must constitute an "injury in fact."

### III. INJURY IN FACT

Passing for the moment the "zone of interests" issue, the question posed by NLG's refusal to identify one or more of its members who may be affected by ACNGS is whether, in the absence of such an identification, it is possible for the agency to reach a well-founded conclusion regarding the existence of an "injury in fact."

NRDC-INSPIRE cite cases for the proposition that the courts have not required such an identification of members. But in none of these cases was the identification of members at issue. This may possibly be explained by the assumption

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1/ Sierra Club v. Morton, 405 U.S. 727 (1972); Warth v. Seldin, 422 U.S. 490 (1975); Hunt v. Washington Apple Advertising Commission, 432 U.S. 333 (1977).

2/ Cf. Health Research Group v. Kennedy, C.A. No. 77-0734 (D.D.C., filed March 13, 1979), infra.

of the parties that such identification could easily be obtained in view of the nature of the organizations involved. Thus, Sierra Club is a national organization with a well established national constituency.<sup>3/</sup> Likewise, there could exist no question as to the "membership" of the Washington Apple Advertising Commission--all growers were required to pay dues to the organization and elected the Commission's members.<sup>4/</sup>

The National Lawyers Guild presents a different and more difficult problem which is discussed in Part IV, below. For present purposes we simply note the statement of NRDC-INSPIRE that:

"If all members from whom standing is derived were to resign the NLG would no longer have standing to intervene. So long as injured persons remain members, the NLG has standing..."  
(NRC-INSPIRE Brief, p. 12).

NRDC-INSPIRE is right; and we submit that, without some identification, it is not possible for the ASLB or the Appeal Board to know whether, as of the date they speak, the NLG has members in good standing within the "geographic zone of interest." As a practical matter, this leaves the agency without any means of ascertaining the existence of an "injury in fact."

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<sup>3/</sup> Sierra Club v. Morton, supra.

<sup>4/</sup> Hunt v. Washington Apple Advertising Commission, supra;  
See Health Research Group v. Kennedy, supra, p. 2.

#### IV. THE ZONE OF INTERESTS

This problem becomes more acute where, as here, the interests sought to be protected by the organization are not "germane to the organization's purpose."<sup>5/</sup> NLG describes its purpose as follows:

The objects of the Petitioner organization include the following:

- 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. 6/

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<sup>5/</sup> Hunt v. Washington Apple Advertising Commission, supra, at 343, established a three-fold test for standing:

"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 that participation of individual members in the lawsuit."  
(Emphasis added.)

<sup>6/</sup> Petition for Leave to Intervene of Houston Chapter, National Lawyers Guild, p. 1 (Oct. 11, 1978).

NLG's primary purposes obviously relate to the protection of civil liberties and that is the thrust of one of their major contentions, if not the thrust of their entire intervention.<sup>7/</sup> That generally stated concern that operation of nuclear power plants may entail curtailment of civil liberties is clearly not sufficiently specific to constitute a contention which may be adjudicated in a construction permit proceeding. That concern is best considered "in the less formal atmosphere of a rulemaking proceeding."<sup>8/</sup>

We turn then to NLG's environmental and safety issues. Without expressing a view as to the merits of NLG's contentions in this regard, their subject matter relates to interests protected by NEPA and the Atomic Energy Act. But there is not a word in the NLG's description of its purposes to suggest that these issues bear the remotest relationship to the organization's purposes. It thus seems clear that NLG is, at

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<sup>7/</sup> NLG's representative stated at the prehearing conference:

Mr. Vomacka: As I said, our essential contention, the one we're most interested in is the one concerning the possibilities of surveillance, harrassment and that sort of thing.

Our feeling about that is that our essential contention is that building or operating this plant is going to result in those kinds of activities. ...

Tr. 621; See, generally Tr. 613-629.

<sup>8/</sup> See Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station), LBP-76-12, 3 NRC 277, 286 (1976); aff'd, ALAB-328, 3 NRC 420 (1976).

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best, doing little more than attempting to act as attorney for some portion of its unidentified alleged members who may be aggrieved. The organization thus fails the second standard enunciated in the Hunt case, supra, that "the interests [the organization] seeks to protect [must be] germane to the organization's purpose."

Since the essential elements of its claim to standing rest on such a fragile foundation, it becomes crucial that NLG identify the aggrieved members whose interests support the petition for leave to intervene to verify that they have authorized this action based on their alleged interests and for the members to identify the specific civil liberties they believe to be endangered. Unless there are answers to these fundamental inquiries, NLG is an uncertain commodity--an attorney purporting to represent a client with no identified relevant interest of its own.

NRDC-INSPIRE states correctly that: "Underlying the Supreme Court's analyses of standing is the constitutional requirement that the Court consider only actual 'cases or controversies'" (Brief, p. 10). But how can the agency in the totality of circumstances here present (the nature and special purposes of the organization; the failure to identify members; the absence of any authorization from the aggrieved members or the governing body of the organization) determine whether there is a real party in interest? Is there a party who can be counted on to bring that "concrete adverseness"

which "sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions"?<sup>9/</sup>

Finally, a word on the constitutional issue discussed briefly at pp. 14-16 of the amicus brief. Again, we are in agreement that the relevant authority is NAACP v. Alabama, 357 U.S. 459 (1958) in which, as NRDC-INSPIRE states, the holding is that "unless there is a compelling state interest, an organization may not be forced to disclose its membership list."

It should be first understood that neither the Board nor any party has sought NLG's membership list, but rather the identity of a single individual aggrieved member--sought not to harass or intimidate but rather for the compelling reason of protecting the agency's processes against abuse and assuring reasoned decision-making. We see no assault on the constitutional rights of any person and, even assuming in principle a very minor compromise of those rights, the balance in our view weighs heavily in favor of informed agency decision making.

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<sup>9/</sup> Baker v. Carr, 369 U.S. 186, 204 (1962). The same principle, of course, applies in NRC proceedings where the Commission has observed that:

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 International Co., CLI-76-6, 3 NRC 563, 570 (1976).

V. CONCLUSION

NRDC-INSPIRE states that an NLG member is subject to the same injury whether she is "Jane Doe" or "Jane Thompson"-- that may be true and perhaps enough if either person were identified as a member of NLG. But, by NLG's choice, that is not to be the case here. One must look elsewhere for those indicia of concrete adverseness which might otherwise assure that "it is the injured party, and not merely a well-intentioned advocate, who is, at least in effect, before the Court."<sup>10/</sup> That matter remains under a cloud given the divergence between the organization's purposes and the issues it seeks to litigate in this proceeding. One is left without the assurances which the Courts require to:

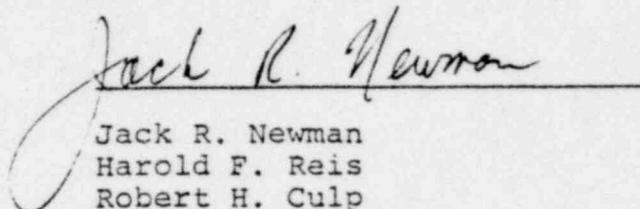
" . . . helps insure, not only that the party before the Court be a competent and effective advocate on the issues presented, but also that the members of the plaintiff organization have had an opportunity to influence their representatives on positions related to the particular member injury at issue." Id.

The NLG appeal should be denied.

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<sup>10/</sup> Health Group, supra, fn. 2.

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