UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Richard S. Salzman, Chairman
Dr. John H. Buck
Michael C. Farrar

SERVED MAY 21 1979

In the Matter of	)	
HOUSTON LIGHTING & POWER CO. et al.	)	Docket Nos. 50-498 OL 50-499 OL
(South Texas Project, Units 1 & 2)	)	

Messrs. Jack R. Newman, Harold F. Reis and Robert H. Culp, Washington, D. C., and Melbert D. Schwartz and Charles G. Thrash, Jr., Houston, Texas, for Houston Lighting & Power Company; The City of San Antonio, Texas; Central Power and Light Company; and The City of Austin, applicants.

Mr. Steven A. Sinkin, San Antonio, Texas, for Citizens Concerned About Nuclear Power, Inc., intervenor.

Mrs. Peggy Buchorn, Brazoria, Texas, for Citizens for Equitable Utilities, Inc., intervenor.

Mr. Henry J. McGurren and Ms. Marjorie B. Ulman for the Nuclear Regulatory Commission staff.

DECISION

May 18, 1979

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(ALAB-549)

This proceeding involves applications to license operation of the twin-unit South Texas nuclear power facility. Six intervention petitions were filed in response to the Commission's Notice of Opportunity for a Hearing on the proposal. 43 Fed. Reg. 33968 (August 2, 1978). The Licensing Board dealt with all six petitions in one decision: it denied

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three of them, granted Texas' unopposed request to participate as an "interested State" under 10 C.F.R. §2.715(c), and allowed Citizens Concerned About Nuclear Power, Inc. (CCANP) and Citizens for Equitable Utilities, Inc. (CEU) to intervene as parties opposed to licensing the plant. LBP-79-10, 9 NRC __(April 3, 1979).

Only the applicants appeal.[1/] They contend that the organizations allowed to intervene should have been rejected because their petitions were late and for lack of "standing" to participate.[2/] The staff supports the Licensing Board's decision.

I.

1. CCANP filed its initial intervention petition before the deadline given in the Commission's Federal Register notice.[3/] Both the applicants and the staff challenged it, however, as defective under the Commission's rules. The Licensing Board

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1/ Our jurisdiction is invoked under 10 C.F.R. §2.714a.

2/ The Licensing Board also "conditionally denied" the intervention petition of Austin Citizens for Economical Energy unless that organization supplied certain additional information. Applicants appeal from this aspect of the Board's order as well, but as ACEE never attempted to fulfill the Board's condition, that appeal is moot.

3/ That Notice announced September 1, 1978 as the deadline for intervention petitions. 43 Fed. Reg. at 33969. CCANP's initial petition was submitted on August 31st.

rejected the petition as submitted but, in line with the staff's suggestion, it allowed CCANP opportunity to cure tne defects by amendment.[4/]

CCANP filed an amended petition on December 26, 1978.[5/] According to it, the organization sought to intervene "on its own behalf and on behalf of its members." The document recited the names and addresses of four individuals represented to be CCANP members who "reside within twenty-five miles of the South Texas Nuclear Project." Their interests were characterized as the possible subjection "to unnecessary risk of life and/or property from accident or ordinary operation of the South Texas" facility. The petition also recited a series of proposed contentions bearing on health and safety matters related to the nuclear plant's operation.

At its January 11, 1979 prehearing conference to consider the petitions to intervene, the Licensing Board suggested that CCANP further substantiate its claims to speak for individuals residing near the plant.[6/] In response, on

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4/ Order of October 23, 1978, p. 9. The rules contemplate such amendments. See 10 C.F.R. §§2.714(a)(3) and 2.714(b).

5/ This was within the time allowed it by the Board below.

6/ See Prehearing Conference of January 11, 1979, Tr. 88-89.

January 14th CCANP supplied an affidavit from one of the members named in its petition, George J. Bunk, attesting to his residence within seven miles of the South Texas facility, his wish to have CCANP represent his interests, and his adoption of the organization's December 26th petition. The Board thereafter allowed CCANP to intervene.

2. "Standing" is legal shorthand for the right to take part in a given case. In determining whether a party may participate in Commission proceedings as a matter of right, the test applied is the one used by the federal courts: a prospective intervenor must show that the outcome of the proceeding threatens one (or more) of its interests arguably protected by the statute being administered. 7/

Applicants do not challenge Mr. Bunk's personal standing. 8/ Rather, they object to CCANP's right to intervene as his representative, asserting that there is insufficient "nexus" between the organization's interests and his own. The crux of their complaint is that most of CCANP's membership is in San Antonio, some 120 miles from the plant. Applicants

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7/ Portland General Electric Co. (Pebble Springs Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976); Edlow International Co., CLI-76-6, 3 NRC 563, 569-70 (1976).

8/ As indeed they could not successfully do. His allegations of residence within seven miles of the South Texas facility, coupled with his expressed concern about injury to his person and property should the plant malfunction were sufficient to demonstrate his "real stake" in the outcome of the proceeding. Virginia Electric & Power Co. (North Anna Station Units 1 & 2), ALAB-522, 9 NRC __, __ (January 26, 1979)(slip opinion at 3-4), and cases there cited.

reiterate that "we are concerned [here] with the relationship between an organization which will itself sustain no injury, and one isolated individual in a position to allege injury in fact."[9/]

The objection is not well taken; concerns of that nature have been allayed at the highest level. Writing for the Court in Warth v. Seldin, Mr. Justice Powell explained that

> Even in the absence of injury to itself, an association may have standing solely as the representative of its members .... The association must allege that its members, or any one of them, are suffering immediate or threatend injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit ... So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensible to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.10/

The application of those judicial standards to CCANP's petition constrains our agreement with the Board below that, in the circumstances described, the organization has demonstrated standing to intervene derived from the

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9/ Applicant's Brief, p. 22 fn. 21 (emphasis in original).

10/ 422 U.S. 490, 511 (1975), as quoted with approval by the Court in Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 342-43 (1977)(emphasis supplied).

interests of at least one member.[11/]

No doubt there are instances where the concerns of an organization and those of its members are so disparate that the former may not be an appropriate representative of the latter's interests.[12/] But such considerations are not present in this case. We agree with the Licensing Board that the stated purposes of "Citizens Concerned About Nuclear Power" are sufficiently germane to warrant its representation of Mr. Bunk's essentially similar concerns in a proceeding looking toward licensing operation of a nuclear power plant. See 9 NRC at ___ (slip opinion at 17).

Finally, we cannot draw applicants' proposed distinction between the right of San Antonio-headquartered CCANP to represent the interests of a few members elsewhere in Texas and a national organization's standing to represent some members' local interests. The latter was said to be sufficient in Sierra Club v. Morton, 405 U.S. 727, 740 (1972). The

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11/ Applicants' reliance on Health Research Group v. Kennedy, No. 77-0734 (D.D.C., filed March 13, 1979), is misplaced. The decision rejected the claim of an organization without members to have standing solely as the representative of its contributors and supporters. That is not the case here. See fn. 8, supra.

12/ See, Hunt v. Washington Apple Advertising Comm'n, supra, 432 U.S. at 343-44.

connections binding the group's and members' interests in both cases appear comparably strong (or tenuous) to us.[13/]

3. As we mentioned, CCANP's initial petition was timely filed. Applicants nevertheless contend that its intervention should have been denied as unjustifiably late. Their argument rests on a technical point of law.

A Licensing Board in another case recently required a group seeking to intervene on a representative basis -- i.e., to protect its members' rather than its own interests -- to demonstrate that it was authorized to act for persons with the requisite standing at the time its petition was filed. If it only afterwards acquired those members, its petition must be treated as though filed when they joined. The Board reasoned that the organization lacked standing to intervene until that later time. Washington Public Power Supply System (WPPSS Nuclear Project No. 2), LBP-79-7, 9 NRC__(March 6, 1979).

13/ It does not follow, as applicants suggest, that a California-based group would necessarily have standing to represent the parochial interests of its single member in New York. That question can only be answered in the context in which the right is asserted; obviously we need not decide it here. The idea that rights and remedies may turn upon differences in degree, however, is hardly a novel legal concept. See, e.g., Nash v. United States, 229 U.S. 373 (1913); LeRoy Fibre Co. v. Chicago M. & St.P. R. Co., 232 U.S. 340, 354 (1914)(Holmes, J., concurring).

Applicants pointed out to the Board below that CCANP's standing is similarly derivative. They therefore sought leave to discover from CCANP when Mr. Bunk became a member in order to apply the ruling in WPPSS No. 2 to this case. The Licensing Board, however, declined to allow that discovery.[14/] Applicants consequently tell us that, in the absence of other evidence, it must be assumed Mr. Bunk joined CCANP contemporaneously with his January 14th affidavit. They therefore argue that, under WPPSS No. 2, CCANP's petition to intervene must be deemed to have been filed at that time, some four months late as a matter of law. Applicants reason that CCANP is thus not entitled to intervene as a matter of right but that its participation turns on the application of the four factors governing late interventions, set out in 10 C.F.R. §2.714(a).

Accepting arguendo applicants' view of the law, we note that the Board below did purport to consider the relevant factors using essentially the applicants' assumptions about lateness. It concluded, however, that on balance

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14/ The Board accepted the staff's argument that such discovery was not authorized by the Rules of Practice. See LBP-79-10, supra, 9 NRC at __(slip opinion at 19 fn. 3), and 10 C.F.R. §2.740(b). Our disposition of the point renders it unnecessary to reach that issue.

the factors weighed in favor of admitting CCANP.[15] Thus, the question reaches us boiled down to whether the Licensing Board abused its discretion in allowing the intervention.[16]

The issue does not long detain us. As the Commission stressed in West Valley, the key policy consideration for barring late intervenors is one of fairness, viz., "the public interest in the timely and orderly conduct of our proceedings."[17] But if CCANP was "late" , it was only in a legalistic sense; its initial petition was actually filed a day early. And, while they saw other defects in it, applicants did not see fit to challenge its timeliness for more than six months. They did so on only March 14, 1979, undoubtedly inspired by the WPPSS No. 2 decision rendered a week earlier.

Applicants are thus in no position to complain that they were surprised by CCANP's appearance on the scene, or that commencement of the hearing would be unreasonably delayed by allowing that organization to intervene. More-

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15/ 9 NRC at __ (slip opinion at 19 fn. 3). The Board treated CCANP's petition as filed in December 1978, when Mr. Bunk was first identified as a CCANP member in the petition to intervene, rather than in January 1979 when his affidavit was filed. Assuming the correctness of the rule in WPPSS No. 2, we agree.

16/ Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975); Florida Power & Light Co. (St. Lucie Plant, Unit No. 2), ALAB-420 6 NRC 8, 13 (1977), affirmed, CLI-78-12, 7 NRC 939, 946 (1978).

17/ CLI-75-4, supra, 1 NRC at 275.

over, this proceeding was noticed early. The South Texas facility is not on the verge of completion; no suggestion is put forward that the conduct of a public hearing would delay licensing the plant for operation (assuming this is found to be warranted).[18/]

An overwhelming showing on the "four factors" was not required to support a conclusion that CCANP should be permitted to intervene in these circumstances. The Licensing Board's judgment was that the intervention was appropriate. We think it sufficient to state that the applicants have not persuaded us that the Board's basis for reaching that conclusion was unreasonable and therefore an abuse of its discretion.

We arrive at this result in full awareness that -- unlike an application for a construction permit -- no hearing on an operating license application is required in the absence of a bona fide intervenor.[19/] And we agree that boards should be cautious about triggering such hearings at the behest of those without a statutory right to intervene.[20/] But we stress again that CCANP's standing is firmly grounded. The

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18/ According to the Notice of Opportunity for Hearing, "Construction of unit 1 is anticipated to be completed by May 31, 1980, and unit 2 by October 31, 1981", and the staff had not completed its draft environmental impact statement. See 43 Fed. Reg. at 33969. See, also, 10 C.F.R. §51.51 and 51.52.

19/ Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-183, 7 AEC 222, 226 fn. 10 (1974).

20/ See Tennessee Valley Authority (Watts Bar Plant, Units 1 & 2), ALAB-413, 5 NRC 1418, 1422 (1977).

interests of those it represents "may be affected by the proceeding" within the meaning of section 189a of the Atomic Energy Act, which enjoins the Commission to "admit any such person as a party to [the] proceeding."[21] It is neither congressional nor Commission policy to exclude parties because the niceties of pleading were imperfectly observed. Sounder practice is to decide issues on their merits, not to avoid them on technicalities.

Nor is a board at liberty to reject a party's intervention petition -- as applicants' papers seemingly imply -- because of doubts about the party's ability to prove its case.[22] The Rules of Practice designate avenues for avoiding an evidentiary hearing where it is not needed; one must follow the paths prescribed, however, to reach that result. 10 C.F.R. §2.749.[23]

21/ 42 U.S.C. §2239(a).

22/ Long Island Lighting Co. (Jamesport Station, Units 1 and 2), 2 NRC 631, 654 (1974) (concurring opinion), Cf., Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 51-52 (1938)(Brandeis, J.); Petroleum Exploration, Inc. v. PSC, 304 U.S. 209, 222 (1938)(test accompanying fn. 20).

23/ CCANP's appellate brief was accompanied by a motion to reconsider our refusal to strike applicants' appeal, ALAB-545, 9 NRC__, May 7, 1979. That motion is now moot; in any event, it was not well-taken. CCANP had no basis for saying that it was difficult, after the filing of the applicants' notice of appeal, "to ascertain exactly what is being urged on appeal." That assertion ignored that, as the rule governing intervention appeals requires (10 C.F.R. §2.714a), the applicants had filed contemporaneously with their notice a brief containing their full appellate argument. Detailed exceptions would therefore have been redundant and, for precisely that reason, a simple notice of appeal suffices under Section 2.714a. Compare Rules 3(c) and 15(a) and Forms 1 and 3 of the Federal Rules of Appellate Procedure.

II.

The intervention petition of Citizens for Equitable Utilities, Inc. was filed on February 23, 1979. It described CEU as representing nearly four thousand persons living within 30 miles of the plant. One of them, Mrs. Kenneth C. (Peggy) Buchorn, specifically authorized that organization to represent her interests and adopted its contentions; the organization's board of directors is represented as sanctioning the petition. Among CEU's proposed contentions are assertions that hurricanes in the area are likely to be stronger than those the plant was designed to withstand, and that, in operation, the plant may exceed Commission guideline levels for the release of radiation.

The staff supported CEU's admission despite the lateness of its petition and the Board below allowed the group to intervene. In their appeal, applicants question CEU's standing and argue that, contrary to the Licensing Board's findings, the "four factors" in section 2.714(a) for evaluating late petitions weigh against this intervenor.

We have reviewed the papers with some care. Essentially for the reasons we rejected applicants' similar arguments applied to CCANP in Part I, supra, we are satisfied, as was the Board below, that CEU has demonstrated standing to intervene

to represent Mrs. Buchorn's interests.[24] (Unlike CCANP, a substantial portion of CEU's membership resides near the plant.)

CEU's intervention petition was five months late without good cause. But, as we noted, the "early notice" procedure is being followed here and another party has properly been allowed to intervene. An operating license hearing is thus necessary in any event; applicants are not prejudiced by one additional intervenor in the proceeding. In the circumstances, we defer to the Licensing Board's judgment (supported by the staff) that the relevant considerations favor CEU's admission notwithstanding its tardiness. See LBP-79-10, supra, 9 NRC __(slip opinion at 50-66).

Affirmed.

It is so ORDERED.

FOR THE APPEAL BOARD

Romayne M. Skrutski
Secretary to the
Appeal Board

24/ The applicants imply that CEU may be Mrs. Buchorn's alter ego. Be that as it may, if she has standing to intervene as a matter of right, that she chooses to do so in corporate garb seems a distinction without a difference. The contentions remain unchanged and the burden of carrying forward the proceeding will be no heavier with Mrs. Buchorn in either role.