

NRC PUBLIC DOCUMENT ROOM

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



In the Matter of)
ARIZONA PUBLIC SERVICE)
COMPANY, et al.)
Palo Verde Nuclear Generating)
Station Units 4 & 5)

DOCKET NOS. STN 50-592
STN 50-593

JOINT APPLICANTS' RESPONSE TO THE
AMENDED PETITION FOR CO-INTERVENTION OF THE PALO VERDE
NUCLEAR INTERVENORS

On April 16, 1979, joint applicants Arizona Public Service Company, Southern California Edison Company, El Paso Electric Company, San Diego Gas & Electric Company, Nevada Power Company, Department of Water and Power of the City of Los Angeles, City of Anaheim, City of Burbank, City of Glendale, City of Pasadena, and City of Riverside (the "Joint Applicants") received from the Office of the Secretary of the Commission a copy of an amended petition for co-intervention signed by five individuals proposing to be called the Palo Verde Nuclear Intervenors ("PVNI") (hereinafter referred to as "Petitioners"), and dated March 27, 1979.

Two of the five individuals signing the amended petition, Messrs. Fullinwider and Rhodes, had previously

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signed a "Petition for Co-Intervention" by PVNI in February 1979. In its Memorandum and Order dated March 22, 1979, this Licensing Board denied the petition on the grounds that (1) PVNI had not demonstrated that it had standing to intervene and (2) PVNI had failed to address the five factors pertinent to untimely filings given in 10 C.F.R. §2.714(a)(1). However, the Board did grant PVNI ten (10) days from the date of service of its Order to file an amended petition.

Joint Applicants oppose the amended petition on the independent grounds that (1) Petitioners have failed once again to demonstrate that they have standing to intervene and (2) a balancing of the five factors listed in 10 C.F.R. §2.714(a)(1) and addressed in the amended petition weighs against granting the amended petition.

STANDING

In its amended petition, Petitioners state that they "propose to call [themselves] the Palo Verde Nuclear Intervenors for purpose of identification" and that "each of [them] wishes to be recognized as a co-intervenor." (Amended Petition, at 1.) These statements make it unclear whether Petitioners are seeking to intervene as a group known as PVNI or as five individuals.

Regardless of Petitioners' intent, it is necessary that they demonstrate standing to intervene. An organization has standing to intervene if it can show that it or its

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members have an interest entitled to protection under the Atomic Energy Act. An individual has standing if he can show that he has a protectible interest. The amended petition fails to demonstrate that any of the five individuals signing the amended petition holds the requisite interest. Petitioners' attempt to establish a protectible interest is limited to the allegation that "each lives within the area of metropolitan Phoenix, and thus the health and safety of each may be affected by the outcome of the licensing proceeding." (Amended Petition, at 1.)

In its March 22, 1979 Order, this Board stated that the "Petition for Co-Intervention" was defective because it failed to "specify exactly where in the Phoenix area [the two members alleged to reside in the Phoenix area] do reside or the distance from the Palo Verde Nuclear Generating Station to their residences." (Memorandum and Order, at 5.) Petitioners have failed to cure this defect in spite of the fact that it was brought to their attention so clearly by the Board. They have failed to provide an address or the distance from the Palo Verde site to the residence of any of the five individuals signing the amended petition. Because of this defect, Petitioners have failed to establish standing for either PVNI or any of the five individuals. On this basis alone the amended petition for co-intervention should be denied.

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UNTIMELY PETITION

In its March 22, 1979 Order, this Board stated that there was no basis upon which it could grant PVNI's untimely petition in view of the fact that PVNI had failed to address the factors listed in 10 C.F.R. §2.714(a)(1). Those factors, which are required to be considered by the Board in ruling on untimely petitions, have been addressed by Petitioners in their amended petition. A brief analysis of Petitioners' discussion of these factors, however, leads to the conclusion that the factors clearly weigh against granting the amended petition.

The first factor to be considered is "[g]ood cause, if any, for failure to file on time." Petitioners state in response to this factor that they filed immediately upon learning that Larry Bard, whose own petition to intervene had not at the time been granted, "was in need of aid in adequately fulfilling his prospective role as citizen intervenor." (Amended Petition, at 2.) Whether there is in fact good cause for failure to file in time is a question which must be determined on the basis of the circumstances existing in each particular case. Duquesne Light Company et al. (Beaver Valley Power Station, Unit 2), ALAB-208, RAI-74-6, 959, 967 n.7 (1974). Petitioners here do not claim that they were unaware of the proposal to build Palo Verde Units 4 & 5. Nor have Petitioners provided any information which

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would give one reason to conclude that they were unable to file the petition in a timely manner. Petitioners' statement simply alleges that because they were unaware that Mr. Bard was in need of assistance in order to pursue his contentions adequately, Petitioners should be excused from a timely filing.

In Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760 (1977), the Appeal Board considered an untimely petition filed by a potential intervenor which was endeavoring to substitute itself for a prior participant which had withdrawn and to pursue the same issues which that participant had advanced. The basic explanation offered by the potential intervenor for its late filing was simply that it had been "lulled into inaction" by the prior participant. The Appeal Board rightly rejected this explanation as establishing "good cause". In drawing its conclusion, the Appeal Board cited another case, Duke Power Company (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-440, 6 NRC 642 (1977), for the general proposition that one who sits on the sidelines in reliance on the expectation that an existing participant will adequately represent the non-party's interests assumes a risk that the existing participant's involvement in the proceeding will not fulfill the non-party's expectations. A foreseeable consequence of that risk is that the person who has delayed filing will not be permitted at a later time to

become a party to the proceeding. If the explanation in Gulf States Utilities Company, where the participant had actually withdrawn from the proceeding, was insufficient to establish "good cause", the explanation offered by Petitioners here is even more deficient in view of the fact that the existing participant, Intervenor Bard, is not planning withdrawal but intends to pursue his contentions.

Furthermore, the response which Petitioners make to this first factor leads Joint Applicants to conclude that Petitioners are more interested in providing assistance to Intervenor Bard than they are in participating in this proceeding as intervenors. Joint Applicants are unaware of any Commission regulations which would require Petitioners to become parties in order to provide Intervenor Bard with the assistance they feel he requires in contacting and financing experts to support his contentions. Therefore, there is no need to grant intervenor status to Petitioners in order for them to achieve their objectives. Based on these considerations, this first factor weighs against granting the amended petition.

The second factor is "[t]he availability of other means where the petitioner's interest will be protected." Here Petitioners offer in part that "[n]o other petitioner before the Licensing Board is on record as showing interest

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in the contentions presented to the Board by the citizen intervenor, Mr. Larry Bard." (Amended Petition, at 2.) It is not clear to Joint Applicants on what basis Petitioners believe this statement supports their amended petition. In Joint Applicants' view, the statement shows that Petitioners are interested in the same contentions as have been presented and will be pursued by Intervenor Bard. And because Petitioners are simply supporting Intervenor Bard's contentions, their interest will be adequately protected by an existing participant. To the extent that Petitioners feel their interest will not be sufficiently protected because Intervenor Bard is in need of assistance, Joint Applicants state again that such assistance can be provided by Petitioners without the need to admit them as parties to this proceeding.

The third factor is "[t]he extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record." Consideration of this factor clearly weighs against granting the amended petition. Petitioners have provided no information nor made any allegations that any legal or technical expertise from among their group will be brought to bear on the contested issues. Such expertise is necessary in order to conclude that a petitioner unrepresented by counsel will be able to contribute meaningfully to a licensing proceeding. See Exxon Nuclear Company, Inc. (Nuclear Fuel Recovery and Recycling Center), LBP-77-59, 6 NRC 518 (1977). Furthermore, one may

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draw a negative inference of Petitioners' ability to contribute from the fact that they wish simply to pursue the contentions of an existing participant. See Wisconsin Public Service Corp. et al. (Kewaunee Nuclear Power Plant), LBP-78-24, 8 NRC 78, 83 (1978). Accordingly, this factor also weighs against granting the amended petition.

The fourth factor is "[t]he extent to which the petitioner's interest will be represented by existing parties." Petitioners' discussion here is simply a reference to their statements made in response to the second factor. Joint Applicants fail to see how Petitioners' discussion of the second factor is of assistance in concluding that Petitioners' interest will not be represented by an existing party. Assuming that one or more of the individuals signing the amended petition are within the zone of interests protected by the Atomic Energy Act, and noting Petitioners' statement that they are concerned about their safety and welfare, it is concluded that Petitioners share an identity of interest with Intervenor Bard. Therefore, their interest would be adequately represented by an existing party.

The fifth and final factor is "[t]he extent to which the petitioner's participation will broaden the issues or delay the proceeding." Petitioners here state that they are concerned with the contentions presented to the Board by

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Intervenor Bard and also state elsewhere in their amended petition that the contentions which they wish to support are those stipulated to by Intervenor Bard, the Staff, and the Joint Applicants at the special prehearing conference held in this matter on February 21, 1979. (See "Report Regarding Stipulation Reached by the Applicant, NRC Staff and Larry Bard", dated February 26, 1979.) Therefore, it does not appear that Petitioners' participation necessarily will broaden the issues. However, Joint Applicants are concerned that Petitioners' participation will delay the proceeding. Joint Applicants' concern in this regard is that Petitioners appear to be unfamiliar with the Commission's regulations¹ and have made no showing that they would be able to understand and contribute to a resolution of the technical issues to be considered. Accordingly, the fifth factor also weighs against granting the petition.

In summary, all five of the factors of Section 2.714(a)(1) weigh against granting Petitioners' amended petition. In Duke Power Company (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-431, 6 NRC 460 (1977), where an untimely petitioner for intervention tendered no good excuse

1) It is noted that Petitioners failed to serve both their original and amended petitions on Joint Applicants and they failed in their original petition to address the factors which must be considered in determining whether to grant an untimely petition.

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for tardiness, the petition was denied even though two of the remaining four factors favored granting the petition. Where, as in this case, none of the five factors listed in Section 2.714(a)(1) favors granting the amended petition for co-intervention, it is clear that the amended petition should be denied as untimely. Joint Applicants reiterate that Petitioners' primary objective, which is to provide assistance to Intervenor Bard, can be achieved without their participation as parties.

DISCRETIONARY INTERVENTION

Since Petitioners are not entitled to intervene as a matter of right, the remaining question is whether this Licensing Board should exercise its discretion and permit Petitioners to co-intervene. This question was analyzed by Joint Applicants in their March 9, 1979, response to PVNI's "Petition for Co-intervention." It was concluded from that analysis that PVNI's situation was not an instance where intervention should be granted as a matter of discretion. That analysis and the conclusion drawn therefrom remain applicable and are therefore incorporated by reference in this response.

Based on the foregoing, Joint Applicants submit that Petitioners' amended petition for co-intervention

should be denied.

RESPECTFULLY SUBMITTED this 26th day of April,
1979.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been served upon the following listed persons by deposit in the United States mail, properly addressed and with postage prepaid.

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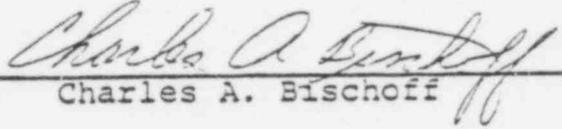
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