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PROD. & UTIL. FAC. 50-282, 306

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

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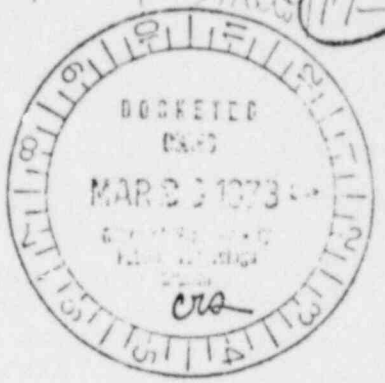

In the Matter of NORTHERN STATES POWER COMPANY (Prairie Island Nuclear Generating Plant, Units 1 and 2)	Docket Nos. 50-282 50-306

Messrs. Gerald Charnoff and Jay E. Silberg, Washington, D. C., for the applicant, Northern States Power Company

Mr. Myron S. Kaufman for the AEC Regulatory Staff

Mr. Robert J. Vollen, Chicago, Illinois, for petitioners, BPI and James Thomas Nodland.

DECISION
(ALAB-107)

On June 25, 1968, pursuant to a Licensing Board authorization, construction permits were issued to the Northern States Power Company for two pressurized water reactors (denominated Prairie Island Nuclear Generating Plant, Units 1 and 2) to be located at a site in Burnside Township, Goodhue County, Minnesota, on the western bank

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of the Mississippi River near Red Wing. On October 11, 1972, a notice was published in the Federal Register (37 F.R. 21455) to the effect that consideration would be given to the issuance of operating licenses for the facility. The notice stated, inter alia, that within 30 days "any person whose interest may be affected by this proceeding may file a petition for leave to intervene with respect to the issuance of the facility operating licenses". In this regard, specific reference was made to the provisions of Section 2.714 of the Rules of Practice, 10 CFR §2.714, relating to the form and content of petitions for leave to intervene.

In response to the notice, petitions for leave to intervene were filed by (1) the Minnesota Pollution Control Agency (MPCA); (2) Steven J. Gadler; and (3) BPI (formerly Businessmen for the Public Interest) and James T. Nodland jointly. Answers to the petitions were filed by the applicant and the regulatory staff.

On February 23, 1973, the Licensing Board established to consider these petitions issued a memorandum and order in which it (1) granted the MPCA and Gadler petitions; and (2) denied the BPI-Nodland petition on the ground that it failed to comply with certain provisions of 10 CFR §2.714. BPI and Mr. Nodland were given 10 days

in which to supplement their petition so as to bring it into conformity with those provisions.

Invoking our jurisdiction under 10 CFR §2.714a (37 F.R. 28710, December 29, 1972), both the applicant and BPI —— Mr. Nodland have appealed to us. The applicant complains of the granting of the Gadler petition and BPI and Mr. Nodland attack the denial of their petition. The granting of the MPCA petition is not encompassed in either appeal and, therefore, is not before us.[1/]

For the reasons hereinafter stated, we conclude that the result reached by the Licensing Board should not be disturbed. Accordingly, we affirm on both appeals.

I

The BPI-Nodland Petition

A. The BPI-Nodland petition alleges essentially the following facts: BPI is a non-profit Illinois corporation which, since its inception in 1969, "has supported, encouraged and participated in citizen efforts to preserve and protect the environment of the Midwestern United States as well as the health and safety of its inhabitants".

1/ In the circumstances, a hearing on the proposed issuance of the operating licenses is required irrespective of our disposition of the two appeals. A notice of such a hearing was issued on February 23, 1973.

Several BPI members live in Minnesota "[w]ithin the vicinity of" the Prairie Island facility. Specifically identified in the petition were two residents of Minneapolis (affiliated with the University of Minnesota) and a resident of Northfield (affiliated with Carleton College).[2/] These individuals authorized BPI counsel to represent their interests in these proceedings. They are concerned respecting the impact of the facility upon the "health, safety and welfare" of themselves and their families, as well as upon the environment of the area. Each of them uses the Mississippi River and other "natural resources" near Red Wing for a variety of "health, recreational and aesthetic purposes".

Mr. Nodland is a student at St. Olaf College in Northfield. The allegations respecting his interest closely parallel those relating to the BPI members.

Neither BPI, its identified Minnesota members or Mr. Nodland furnished a supporting affidavit attesting to these facts. The petition did, however, contain the notarized "affirmation" of counsel to the effect that

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2/ We take official notice of the fact that, as alleged in the petition, Minneapolis and Northfield are, respectively, approximately 40 and 30 miles from the facility site.

he had been "informed" of the petition and that all statements made therein were "true to the best of my knowledge and belief".

Further, no attempt was made by petitioners to comply with the requirement in 10 CFR §2.714(a) that a petitioner identify "the specific aspect or aspects of the subject matter of the proceeding as to which he wishes to intervene and [set] forth with particularity * * * the basis for his contentions with regard to each [such] aspect". It was because of this failure that the Licensing Board denied the petition with leave to file the required information within 10 days. No such filing was made.

B. As a threshold matter, BPI and Mr. Nodland challenge the Licensing Board's jurisdiction to pass upon its petition for leave to intervene in this operating license proceeding. They note that, prior to the amendment of 10 CFR §2.714 which became effective on December 29, 1972 (37 F.R. 28710), such petitions were considered ab initio by the Commission itself. While acknowledging that the effect of the amendment was to delegate this authority to the licensing boards, petitioners argue that it cannot be applied to the disposition of petitions filed before

December 29, 1972. The petition here was filed on November 10, 1972.

Petitioners do not suggest that the amendment was not intended by the Commission to apply to petitions which, although filed before its adoption on December 29, still remained for consideration and decision. Nor is it contended that the Commission lacked the power to delegate to the licensing boards the authority to act on intervention questions arising in operating license proceedings -- a contention which would obviously be foreclosed by Section 191 of the Atomic Energy Act, 42 U.S.C. 2241. Instead, petitioners insist (Br. p.4) that the amendment effected a "substantial and prejudicial change in [their] rights" and, as such, cannot be applied "retroactively".

We think it manifest, however, that in its application to petitioners, the amendment occasions no infringement of any "right" possessed by petitioners. Neither the governing statutes nor the Commission's regulations have ever conferred upon would-be intervenors a vested right to have their petitions for leave to intervene considered in the first instance by the Commission. And it has been judicially recognized that one has no due process right to have his cause considered by any particular

tribunal. Cf. Turner v. United States, 410 F.2d 8[illegible] (5th Cir. 1969); United States v. Haughton, 413 F. 2d 736 (9th Cir. 1969).

Further, petitioner's assertion that they have been prejudiced by the delegation to the Licensing Board here involved is entirely bootless. To begin with, it is not true, as petitioners assert (Br. p.4), that "notwithstanding the provisions of Section 2.714, the [Licensing] Board would not exercise the authority to grant" the petition (emphasis supplied). It was, rather, because of the provisions of that Section, and petitioners' conceded failure to comply with them, that their petition was denied. In any event, the mere fact that the transferee forum (i.e., the Licensing Board) may have decided against the litigant can scarcely furnish a basis for a claim of prejudice -- particularly where, as here, the transferor forum (i.e., the Commission) will ultimately have the opportunity to review the correctness of that decision.

C. On the merits of the disposition below of their petition, petitioners' appeal presents essentially a challenge to the validity of the requirement of Section 2.714(a) that their moving papers set forth "the basis for [their] contentions with regard to each aspect [of the proceeding] on which [they] desire to intervene". Before

examining that challenge, however, we consider the question as to whether petitioners fulfilled another requirement contained in that Section -- namely, that each of them establish that his interest may be affected by the proceeding and that this showing be accomplished by an affidavit setting forth with particularity the "facts pertaining to [that] interest". While the Licensing Board seemingly found it unnecessary to consider this question,[3/] it has been raised by the applicant in its brief before us.

1. We believe that the facts alleged in the petition with regard to the interest of the three identified BPI members and Mr. Nodland (see p.4 , supra) provide, if true, a sufficient foundation for their standing to intervene as persons "whose interest may be affected" by the grant of an operating license to this facility. Cf. Sierra Club v. Morton, 405 U.S. 727 (1972). In this connection, we reject applicant's insistence that these individuals live at too appreciable a distance from the site to have an affected interest. Without attempting to lay down any

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3/ We take the Licensing Board's references to the absence of supporting affidavits to relate only to the matter of the development of the basis for petitioners' contentions.

inflexible standard, we deem distances of 30 to 40 miles from this reactor site as not being so great as to require the conclusion that residents of Minneapolis and Northfield are geographically outside of the zone of interests protected by the Atomic Energy Act. Cf. Association of Data Processing Service Organizations v. Camp, 397 U.S.150 (1970). Moreover, applicant's argument overlooks the allegation that the BPI members and Mr. Nodland use the area in close proximity to the facility for a variety of recreational and other purposes.

Characterizing BPI as a "Chicago-based organization whose atomic energy interests are centered around nuclear plants in Lake Michigan" (Br. p.5), applicant appears further to suggest that, whatever may have been the averments of fact relating to the interest of the individuals named in the petition, we should presume that BPI's sole real purpose in seeking to intervene was to challenge the validity of a Commission regulation (i.e., portions of Section 2.714). We decline, however, the invitation to embark upon the always dangerous pastime of making and acting upon speculative assumptions of that kind. We must take the petition at face value, without searching to determine whether there may have been unarticulated, ulterior motives underlying its filing.

2. The question remains whether the notarized affirmation of petitioner's counsel that all of the averments of fact in the petition were "true to the best of [his] knowledge and belief" constitutes adequate compliance with the Section 2.714(a) mandate that the facts pertaining to the interest of the petitioners be set forth in a supporting affidavit. We hold that it does not.

If given a very literal reading, Section 2.714(a) might be taken to mean that the relevant facts always must be developed in a document separate and distinct from the petition itself -- i.e., in an affidavit accompanying and in support of the petition. But we do not believe that such a strict construction is necessitated. The purpose of the affidavit requirement would seem to be fully served by the inclusion of the factual averments relating to interest in the petition -- so long as the petition is verified by one or more persons who have direct, personal knowledge of the truth of those averments. Normally this would be either the petitioner or (if the petitioner is an organization and not an individual) officers or members thereof possessing the requisite familiarity with the facts.

It follows that the affidavit requirement pertaining to the interest of petitioners would have been satisfied here had each of the three identified BPI members and Mr. Nodland verified the truth of the specific factual representations contained in the petition which related to him. But it does not follow that their counsel's affirmation likewise was an acceptable substitute for an affidavit. Counsel did not attest that, as a matter of his own knowledge, the averments of fact in the petition relating to the BPI members and Mr. Nodland were true. And, very likely, no such attestation would have been possible. Counsel is located in Chicago and presumably has had little, if any, opportunity to determine for himself, e.g., whether and to what extent Mr. Nodland uses the area in the vicinity of the facility for recreational purposes.

Accordingly, quite apart from the matter of its compliance with the other directives of Section 2.714, the BPI-Nodland petition was deficient in that it failed to satisfy the requirement that the facts pertaining to interest be set forth by affidavit. For reasons that will appear later (infra, pp. 12-18), we need not decide whether, in the totality of circumstances, a remand to the Licensing Board to give petitioners an opportunity to cure this deficiency would be justified. But the licensing boards

established to pass upon intervention petitions should insure in the future that the factual averments respecting the interest of the petitioner are properly verified in accordance with the foregoing views of this Board. If it finds that this has not been done, such a board may, in its discretion, afford the petitioner a reasonable opportunity to remedy the defect.

D. We now turn to petitioners' principal contention on their appeal: that the Commission exceeded its statutory authority in requiring in Section 2.714(a) that they both identify the specific aspect or aspects of the subject matter of the proceedings as to which intervention is sought and set forth with particularity the basis for their contentions with regard thereto. Petitioners expressly concede (Br. p.5) that they have not satisfied this requirement in the present case.

We need not reach the question as to whether this Board has the power to invalidate a duly promulgated regulation of the Commission. For, in our view, the challenged portions of Section 2.714(a) are valid.

1. Petitioners' position rests in substantial measure upon the proviso in Section 189a. of the Atomic Energy Act (42 U.S.C. 2239(a)) that:

> In any proceeding under this Act, for

> the granting, * * * of any license * * * the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

Petitioners take this to mean (Br. p.6) that "[o]nce a sufficient interest is shown the Commission has no discretion to exclude one person from fully participating as a party to the proceeding or to impose any additional prerequisites to any such participation." We do not think, however, that this is either a compelled or sensible construction of the Section.

One can readily grant that Section 189a. constitutes an authoritative congressional declaration regarding who shall be deemed to have standing to "request" a hearing on the granting of a construction permit or operating license: if the individual has an interest which "may be affected by the proceeding", the requisite standing perforce exists. But neither Section 189a. nor any other provision of the Act decrees the form or content of the "request".

It is a fair inference that Congress was willing to leave this matter to the Commission upon which the Act confers very broad rule-making authority.

Specifically, the Commission is empowered to "prescribe such regulations or orders as it may deem necessary * * * (3) to govern any activity authorized pursuant to this Act" (Section 161i.,42 U.S.C. 2201(i)). Additionally, Congress has authorized it to"make, promulgate, issue, rescind, and amend such rules and regulations as may be necessary to carry out" the statutory purposes. (Section 161p., 42 U.S.C. 2201(p)). Congress may also have had in mind that, as the courts have consistently recognized, an administrative agency must be given wide latitude in the fashioning of procedural rules governing the conduct of its proceedings. See e.g., FCC v. Schreiber, 381 U.S. 279, 290 (1965); FPC v. Texaco, Inc., 377 U.S. 33,39 (1964); United States v. Storer Broadcasting Co., 351 U.S. 192, 202 (1956); City of San Antonio v. CAB, 374 F. 2d 326, 332 (D.C. Cir. 1967). This principle is, of course, fully applicable to the Atomic Energy Commission. Cf. Siegel v. AEC, 400 F.2d 778, 783 (D.C. Cir. 1968).

We find no abuse of that rule-making authority here. Section 2.714(a) reflects the administrative conclusion that the effectuation of the purposes of the Atomic Energy Act requires that the request for a hearing (in the form of a petition for intervention) include an identification of the contentions which the petitioner seeks to

have litigated in the matter. To our mind, there is nothing unreasonable about this conclusion. It certainly would not further -- but indeed would impede -- the orderly carrying out of the adjudicatory process to accord an individual the status of a party to a proceeding in the absence of any indication that he seeks to raise concrete issues which are appropriate for adjudication in the proceeding. This is particularly so on the operating license level where, by virtue of Section 189a. of the Act itself, there is no mandatory hearing requirement; i.e., the license may be issued without a hearing in the absence of a proper request therefor. It is difficult for us to perceive any rational basis for triggering the hearing mechanism without regard to whether there are, in fact, any questions which even possibly might warrant resolution in an adjudicatory proceeding. Cf. Citizens for Allegan County, Inc. v. FPC, 414 F. 2d 1125 (D.C. Cir. 1969); Environmental Defense Fund v. Ruckelshaus, 439 F. 2d. 584, 594-595 (D.C. Cir. 1971).4/

We are unimpressed with petitioners' suggestion (Br. pp. 2-3) that it is not possible for them to state specific contentions until after they have been permitted to intervene and to avail themselves of discovery procedures. In the first place, we can take official notice

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4/ It is a totally fortuitous and irrelevant circumstance that, in this instance, the hearing mechanism has been triggered by the filing of other petitions which do satisfy the requirements for intervention.

of the fact that, without prior resort to discovery, BPI has filed contentions in several past cases. More fundamentally, the suggestion ignores the fact that there is abundant information respecting the particular facility available to the public at the time of the publication of the notice of hearing or of an opportunity for hearing -- including at least the applicant's detailed safety analysis and environmental reports.[5/] Further, prospective intervenors have the benefit of the Freedom of Information Act (5 U.S.C. 552) and the Commission's regulations implementing that Act. 10 CFR Part 9.

2. We find no greater substance to petitioners' assertion (Br. pp. 8-9) that the contentions requirement in Section 2.714(a) also offends Sect. 6(a) of the

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5/ Information is placed on the public record when an application for a construction permit is accepted by the Commission (10 CFR §2.790). This information is publicly available both in the Commission's public document room in Washington and in an appropriate office near the site of the proposed reactor (10 CFR §50.30(c)(2)). The Commission publishes a notice of receipt of the application, which states the purpose of the application and specifies the location at which the proposed activity will be conducted; the Commission also requires that notification be given to appropriate State and local officials (10 CFR §2.101(b)). Thus, substantial relevant data concerning a proposed reactor is on the public record from the date the application to construct it is accepted by the Commission. The acceptance of the application now long antedates the notice of hearing or opportunity for hearing.

Administrative Procedure Act (5 U.S.C. 555(b)). If anything, that Section cuts against petitioners' position.6/ It provides that:

> So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. (Emphasis supplied.)

The purpose of the contentions requirement is, once again, to require the interested person to establish that there is an "issue" to be presented (by him) and determined (by a Licensing Board) in the proceeding.

3. Had the Licensing Board not given the petitioners the opportunity to bring their petition into conformity with the contentions requirement of Section 2.714(a), we might have felt constrained to provide them with such an opportunity now. In the circumstances, however,

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6/ See Easton Utilities Commission v. AEC, 424 F 2d. 847, 852 (D.C. Cir. 1970).

we see no reason to do so. There is an obvious public interest in this proceeding moving forward without the untoward delay which would be occasioned if petitioners were accorded still another chance to comply with Commission regulations.7/

II

The Gadler Petition

A. Mr. Gadler's petition for leave to intervene was filed on November 13, 1972 and was thereafter amended twice through the submission of "supplemental contentions". In its February 23, 1973 memorandum and order, the Licensing Board ruled that the initial petition should be considered to have been timely filed; that the amendments should be treated as part of that petition; and that

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7/ We recognize that petitioners might have mooted their appeal -- and thus lost the opportunity to present to us their claim that contentions need not be filed -- by submitting contentions within the ten days allowed by the Licensing Board for amending their petition. Had the petitioners wanted to protect their right to file contentions against the possibility that their appeal would be unsuccessful, they could have utilized the well-recognized procedure of seeking a stay pendente lite from the Licensing Board -- and, if unsuccessful there, from this Board -- of the ten day period for amendments. That they did not do so forecloses any contention on their part that they are now entitled to be given ten days -- or indeed any other period -- in which to comply with the terms of the Licensing Board's order.

"considering the entire petition * * * Mr. Gadler should be admitted as a party [to] this proceeding".

Upon the filing of the applicant's appeal, we entered an order on March 8, 1973 (ALAB-104) in which we directed the Licensing Board to issue a supplemental memorandum explaining the reasons for its conclusion that the petition, as amended, complied with the substantive requirements of Section 2.714(a). On March 16, 1973, the Licensing Board issued the supplemental memorandum in which it elaborated upon each of its previous rulings pertaining to the Gadler petition.

With respect to the timeliness of the initial petition, the Licensing Board observed that the 30 day period prescribed by the October 11, 1972 Federal Register notice expired on November 10, 1972 (i.e., three days before the initial petition was filed). A Commission advertisement in the October 12, 1972 issue of the Minneapolis Tribune had, however, represented that the deadline for filing of petitions for leave to intervene was November 13, 1972. While acknowledging that the Federal Register notice controlled, the Board agreed with the regulatory staff that, in the circumstances, good cause had been shown for Mr. Gadler's failure to file his petition prior to November 13, 1972.

In justification of its decision to consider the tendered amendments as part of the initial petition, the Licensing Board relied principally on two considerations: (1) Mr. Gadler might reasonably have expected that he could amend and clarify the petition up to the time of his receipt of a ruling thereon; and (2) the amendments were, at least in part, answers to comments by the staff and the applicant on the initial petition. Additionally, the Board stated that, since it had not been assigned the function of considering the Gadler petition until February 15, 1973, it thought it should "consider all papers previously filed".

Then turning to the content of the petition, as amended, the Board found that Mr. Gadler had established an interest which may be affected by this proceeding; namely, "his stated concern that the operation of the facility would affect both his water supply and food sources". Respecting the matter of compliance with the requirement that the basis for his contentions be set forth, the Board indicated that it deemed its role to be a very limited one:

> The function of this Board was to determine whether or not (1) a hearing was in order, and if so (2) who should be the parties in the proceeding. The

> contentions filed by Mr. Gadler were considered only for the purpose of deciding whether Mr. Gadler had in fact met the minimum requirements of §§2.714 and not for the purpose of prejudging the actions of the Hearing Board on individual contentions. Our view of Mr. Gadler's contentions is that, while we agree in part with both the Applicant's and Staff's comments, some of his contentions may lend themselves to further clarification and specification. We specifically stated that the final determination on which contentions would become matters in controversy would be within the discretion and judgment of the Hearing Board. In our opinion the opportunity of the Hearing Board to meet the parties in a public session is sometimes essential to the final resolution of which contentions, if any, should be admitted and in what form. The Board was also mindful that Mr. Gadler was without benefit of counsel and that ability to articulate proper contentions should not be the only test in determining which contention should be admitted. We were of the opinion that Mr. Gadler should have a further opportunity to clarify his contentions and bases in the presence of a Hearing Board before a final ruling is made by the Board. (Footnotes omitted).

B. Applicant attacks each of the rulings of the Licensing Board except its conclusion that the initial petition should be considered to have been timely.

1. We regard the acceptance of tendered amendments to a petition for leave to intervene to be a matter within the discretion of the Licensing Board. In the absence of a showing of a gross abuse of that discretion, this Board will not intervene. No such abuse has been shown here.

2. Similarly, we are not inclined to disturb a Licensing Board's conclusion that the requisite affected interest of the petitioner has been established unless it appears that that conclusion is irrational. In this instance, considering the fact that the petitioner resides in St. Paul -- approximately 40 miles from the facility site -- we cannot say that the Licensing Board was compelled to reject, as a basis for standing, the concerns which Mr. Gadler expressed regarding the effect the operation of the facility might have upon his water supply and food sources.[8/]

3. We agree with the applicant that, in its supplemental memorandum, the Licensing Board made an unsatisfactory disposition of the question as to whether the petition met the contentions requirement of Section 2.714. Contrary to the apparent view of that Board (see pp. 20-21 supra), it was its responsibility to ascertain, before granting the petition, that there was at least one relevant contention which was set forth with reasonable specificity and with some basis assigned for it.[9/] That it plainly failed to do.

8/ Since petitioner verified his initial petition and the amendments thereto, the absence of a separate affidavit setting forth the facts pertaining to his interest is not significant. See p. 10 , supra.

9/ The Board considering the petition for intervention may, of course, pass upon the sufficiency of the remaining contentions.

In normal circumstances, we would remand the proceeding to the Licensing Board to make the requisite determination. Because, as previously indicated, we wish to avoid further delay in this proceeding, we have examined the submissions of Mr. Gadler ourselves and have determined that the contentions requirement is at least minimally fulfilled by Contention 8 in petitioner's "Supplemental Contentions for Leave to Intervene", filed on December 11, 1972:

> Your petitioner contends that since Prairie Island Nuclear Generating Plant will be required to meet the thermal standards set by the Minnesota Pollution Control Agency (MPCA) that the plant will be required to utilize cooling towers for this purpose. Operation of these towers will cause the generation of fog which will constitute a hazard to the public health and safety.

We stress that all we decide now is that, as stated, the contention is adequate to entitle Mr. Gadler to intervene in the proceeding. It remains for him to establish, to the satisfaction of the Board which has been convened to conduct the hearing, that a genuine issue actually exists. If the Board is not so satisfied, it may summarily dispose of the contention on the basis of the pleadings. 10 CFR §2.749.

The same may be said of the other contentions advanced by Mr. Gadler. While there is no need to measure their adequacy as a basis for granting intervention, those contentions, as well, will appropriately be included in an evidentiary hearing only if they present a genuine issue; i.e., are not appropriate for summary disposition. At an early date, the hearing board should obtain from Mr. Gadler any additional specification which it considers necessary to its determination on this score.

III

For the foregoing reasons, the February 23, 1973 memorandum and order of the Licensing Board, as supplemented by its March 16, 1973 memorandum, is affirmed.

It is so ORDERED.

FOR THE ATOMIC SAFETY & LICENSING
APPEAL BOARD

Margaret E. DuFlo
Secretary to the
Appeal Board

Dated: _____