

UNITED STATES OF AMERICA  
 NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of  
 ALL TELETHERAPY LICENSES

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NRC STAFF RESPONSE TO REQUEST FOR HEARING BY  
 LINCOLN HUBBARD, Ph.D. OF THE MIDWEST CHAPTER  
 OF THE AMERICAN ASSOCIATION OF PHYSICISTS IN MEDICINE

The Commission, on February 10, 1981, referred the request of Lincoln Hubbard, Ph.D., to this Atomic Safety & Licensing Board for a determination of whether a hearing is required on the Director's May 7, 1980 Order. For the reasons given below, the request for a hearing should be denied.

BACKGROUND

In response to a number of incidents involving equipment malfunctions of teletherapy units which resulted in the potential for, as well as actual, excessive radiation exposure of patients and unit operators, the Director of the Division of Fuel Cycle and Material Safety, Office of Nuclear Material Safety and Safeguards, on May 7, 1980, issued an immediately effective Order modifying the licenses of all teletherapy licensees. The order required licensees to install a radiation monitor in each teletherapy room so as to provide continuous information on the beam condition. Installation was to take place as soon as possible but in any event no later than 90 days from the date of the Order. In the interim any person entering a teletherapy room following an irradiation was required to enter with a portable survey meter and determine the beam condition.

On May 15, 1980 Lincoln B. Hubbard, Ph.D., of the Legislative Committee of the Midwest Chapter of the American Association of Physicists in Medicine (hereinafter referred to as petitioner) requested a hearing with regard to the Order under the provision of Section IV of the Order offering a hearing to "[a]ny person who has an interest affected" by the Order.

ARGUMENT

Standing to Request a Hearing

The question before the Board for consideration is whether the petitioner is entitled to a hearing on the Director's enforcement order issued to all teletherapy licensees. <sup>1/</sup> Since neither the Midwest Chapter nor the individual submitting the petition, Dr. Hubbard, is a licensee of the Commission (and therefore inherently possessing an "interest" affected by the Order), the Board must determine whether petitioner has an interest which may be affected by the Director's action such that it is entitled to a hearing as of right on the Order. <sup>2/</sup>

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<sup>1/</sup> The Director's Order was issued pursuant to Section 2.204 of the Commission's regulations which provides that:

"The Commission may modify a license by issuing an amendment on notice to the licensee that he may demand a hearing with respect to all or any part of the amendment....When the Commission finds that the public health, safety or interest so requires, the order may be made effective immediately."

<sup>2/</sup> The Commission itself may, of course, afford a hearing to any person at any time as a matter of sound discretion. However, the Commission's Notice of Hearing issued on this order stated that the Atomic Safety & Licensing Board "has been designated to determine whether a hearing is required." (Emphasis added.) Therefore, the issue for the Board here is whether the petitioner falls within the category of persons who may be entitled to a hearing as a matter of right under section 189a of the Atomic Energy Act. See Wisconsin Electric Power Co. (Point Beach Unit 1), Commission Order, (Docket No. 50-266 Request for Hearing, May 12, 1980).

It is settled agency law that in determining whether such an interest has been alleged, Boards are to apply judicial concepts of standing. Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-27, 4 NRC 610, 613-14 (1976). Under this standing test, in the context of an enforcement action such as this Order,<sup>3/</sup> it must appear (1) that the petitioner has been or may be injured in fact, i.e., adversely affected, by the Director's Order, and (2) that the petitioner's interest is arguably within the zone of interests protected by the Atomic Energy Act. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438 (1980).

The injury-in-fact test has also been stated in the following way, "the test is whether a cognizable interest of the petitioner might be adversely affected if the proceeding has one outcome rather than another." Nuclear Engineering Co., Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978). The possible outcomes of a proceeding on this Order have been established by the Notice of

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<sup>3/</sup> It is necessary to note at the outset that the action under consideration is an enforcement action, i.e., an Order issued by the Commission to impose a specific set of restrictions on a Licensee in order to deal with a relatively narrow set of circumstances. Enforcement actions generally occur when the Commission determines that some limitation should be placed on an already existing right. Thus enforcement actions are much more focused in scope than initial licensing actions which consider a much broader range of issues in determining whether the action should be taken.

Hearing. <sup>4/</sup> There are but two possible outcomes. <sup>5/</sup> The outcomes are either: (1) that all teletherapy licenses shall be modified to require the installation of a radiation monitoring device in each teletherapy room or use of a substitute measure as set forth in Part II of the Order, or (2) that teletherapy licenses shall not be modified at all. Petitioner must show that it will or might be injured in fact by one or the other of these outcomes.

The petitioner asserts that it has "no issue with the desirability, and one may even say need for teletherapy room radiation monitors". But it objects to several specific aspects which it feels inhere in the ordered actions: (1) too little time was allowed for implementation; (2) other systems in use by institutions are no less safe than a continuous monitoring system; (3) the requirement of back-up battery power is unreasonable because

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<sup>4/</sup> "(a) Whether the circumstances described in Section I of the May 7, 1980 Order provide an adequate basis for the actions ordered; and

(b) Whether the license should be modified to require the installation of a radiation monitoring device in each teletherapy room or use of a substitute measure as set forth in Part II of the May 7, 1980 Order." 46 Fed. Reg. 12377 (Feb. 13, 1981).

<sup>5/</sup> The Commission recognized in Marble Hill that the possible outcomes of a proceeding on an Order are limited by the scope of the issues to be considered as set forth in the Order. Public Service Co. of Indiana, supra, 11 NRC at 440. Thus, in Marble Hill the terms of the Director's order did not permit a hearing on further remedies. In this case, the scope of the hearing is limited to whether on the basis of the circumstances stated in the Order, the specified license modifications should be imposed. A hearing directed at those issues would not include consideration of more severe or different enforcement actions.

power failures in many hospitals are a very unlikely event; (4) why choose an audible signal over a visible signal; and (5) the use of other substitute measures, such as a "chirpee" type system, have considerable merit.

The crux of the asserted injury is that "needless expense will be placed on those institutions who presently have existing monitoring systems which differ from the requirements of one of the items enumerated as ii, iii, or iv [of the petition]." In addition, petitioner asserts that in many cases use of a calibrated survey meter as a substitute measure will be "less safe and satisfactory than alternate modes". (Petition at 2.)

There are several defects in petitioner's request for a hearing. First, there has been no particularization of how the interest of Dr. Hubbard or the Midwest Chapter of the American Association of Physicists in Medicine might be adversely affected by the ordered action. As the Appeal Board has noted several times, petitioners such as the American Association of Physicists in Medicine may not rely on a generalized interest in or expertise concerning a matter to establish standing to intervene in NRC proceedings. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377 (1979); Nuclear Engineering Co., Inc., supra, 7 NRC 737, 741-743; Allied-General Nuclear Services (Barnwell Fuel Receiving & Storage Station), ALAB-328, 3 NRC 420 (1976). In those cases, the Appeal Board relied on the decision of the U. S. Supreme Court in Sierra Club v. Morton, 405 U.S. 727 (1972),

which held that a national organization could not predicate its standing to seek to enjoin Federal agency approval of commercial development of a national game refuge upon its "asserted special interest in the conservation and the sound maintenance of the national parks, game refuges, and forests of the country." As the Court noted, "...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." 405 U.S. at 739. Petitioner here seems to present the precise case of having "a mere 'interest in a problem'", as opposed to having an interest which could be concretely and adversely affected by these orders.

Nor is it apparent that the Midwestern Chapter of the American Association of Physicists in Medicine even includes members who may suffer the kinds of harm alleged. The types of harms alleged relate to activities of licensees and there is no indication that any such licensees have authorized the AAPM to represent them. In summary, petitioner has not established that it has a particularized interest which might be affected by the outcome of the proceeding. "There must be a concrete demonstration that harm to the petitioner (or those it represents) will or could flow from a result unfavorable to it." Nuclear Engineering Co., *supra*, 7 NRC at 743.

In only one instance does petitioner allege a health and safety impact from an ordered action: "in many cases [the requirement that a calibrated survey meter be used if the monitor is not functioning] will be less safe

and satisfactory than alternate modes". Petition at 1. <sup>6/</sup> While at first glance, this assertion appears to meet the injury-in-fact test, closer examination demonstrates that this alleged harm will not occur as a result of either of the possible outcomes of this proceeding. The possible outcomes of this proceeding are that either a calibrated survey meter will be required as a substitute measure or it will not be. The imposition of a requirement for an alternate, substitute measure is not a possible outcome of this proceeding. Thus the Order does not grant standing to parties seeking additional or different remedies and who argue their interests would be affected by failure to impose one of those additional remedies.<sup>7/</sup>

Secondly, petitioner has not met the second part of the standing test. The principal harm asserted by petitioner is the "needless expense" which the ordered license modification will entail. It is well established that a harm which is purely economic in character is not an "interest" within the zone of interests protected by the Atomic Energy Act. Portland General Electric Co., supra 4 NRC 610 at 614; Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 242 (1980); Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-292, 2 NRC 631, 637-38 (1975). <sup>8/</sup>

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<sup>6/</sup> It should be noted again with this asserted injury, that there has been no demonstration that petitioner or any of its members are in a position to suffer the alleged harm from use of a calibrated survey meter instead of some other system. In addition, the use of a survey meter does not necessarily preclude the use of other systems.

<sup>7/</sup> Public Service Co. of Indiana, supra, at 440 and 442.

<sup>8/</sup> It should be noted that because these Orders were immediately effective, the expenses associated with the required actions have already been incurred.

Finally, the asserted lack of "flexibility" in the Order does not in itself describe any cognizable harm to petitioner. <sup>9/</sup> While petitioner might have chosen a different set of requirements if it were issuing the order, or wishes for the opportunity to do so now, no harm from the actions ordered other than "needless expense" is asserted by petitioner. As noted above, such assertions are inadequate to establish standing to request a hearing as a matter of right on the Director's Order.

Even if the Commission Order in this case had not made it the duty of this Board to determine only whether a hearing is required, it is important to point out that no useful purpose would be served by holding a discretionary hearing on this Order.

In a decision to permit participation in a proceeding on a discretionary basis, the most important factor to be considered is the extent of the contribution which might be expected of the petitioner. Portland General Electric Co., supra 4 NRC at 612, 617, Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-397, 5 NRC 1143, 1145, 1151 (1977); Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 & 2); ALAB-413, 5 NRC 1418, 1422 (1977). While the nature of petitioner's organization and its petition suggest that it possesses substantial knowledge and familiarity with the operation of teletherapy units which could lead to a "valuable contribution" in any proceeding, that factor is outweighed by other circumstances in this case. The petitioner has not demonstrated that it is adversely affected by the Order; its interests are focused on the added expense resulting from the ordered actions and the

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<sup>9/</sup> The order does not explicitly provide licensees with the flexibility to propose alternate methods to achieve the purposes of the order. However, several licensees did seek changes to the requirements and in some cases, changes were approved.



lack of flexibility permitted licensees under the Order. But for petitioner's request, no hearing will be held. <sup>10/</sup> This is of particular significance given the fact that the Order was issued to approximately 300 licensees, none of whom requested a formal hearing on the Order.

The required actions have now been taken by all licensees. In addition, the fact that no licensees requested a hearing, indicates that even had requestor's petition been considered prior to the implementation of the ordered actions, no significant issue exists which is appropriate for consideration in a discretionary hearing.

CONCLUSION

Petitioner has not established that it has standing to request a hearing on the Director's May 7, 1980 Order Modifying All Teletherapy Licenses. Absent adequate demonstration on its part that petitioner has an interest which has been or may be injured by the Order and that petitioner's interest is arguably within the zone of interests protected by the Atomic Energy Act, the request for a hearing should be denied.

Respectfully submitted,

*Karen D. Cyr*  
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Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 25th day of February, 1981.

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<sup>10/</sup> In Tennessee Valley Authority, supra, 5 NRC at 1422, in circumstances where no hearing would be held but for petitioner's request, the Appeal Board noted that discretionary intervention should not be allowed unless petitioner has a substantial contribution to make on a significant safety issue appropriate for consideration at this time.

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CERTIFICATE OF SERVICE

I hereby certify that copies of NRC STAFF RESPONSE TO REQUEST FOR HEARING BY LINCOLN HUBBARD, Ph.D. OF THE MIDWEST CHAPTER OF THE AMERICAN ASSOCIATION OF PHYSICISTS IN MEDICINE and NOTICE OF APPEARANCE in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 25th day of February, 1981.

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