

05/13/83

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of }
PUBLIC SERVICE COMPANY OF INDIANA, INC. } Docket Nos. 50-546
WABASH VALLEY POWER ASSOCIATION, INC. } 50-547
(Marble Hill Nuclear Generating }
Station, Units 1 and 2) }

NRC STAFF RESPONSE TO THE SASSAFRA/ AUDUBON SOCIETY
OF SOUTH CENTRAL INDIANA PETITION FOR INTERVENTION

I. INTRODUCTION

On March 25, 1983, the U.S. Nuclear Regulatory Commission (Commission) published in the Federal Register a Notice of Receipt of an Application for a Facility Operating License, Availability of Applicants' Environmental Report and Opportunity for Hearing (Notice) regarding the above captioned proceeding. (48 Fed. Reg. 12608). The notice provides, inter alia, that any person whose interest may be affected by this proceeding may file a petition to intervene no later than April 25, 1983.

By petition dated April 16, 1983 (postmarked April 23, 1983) (Petition), the Sassafras Audubon Society of South Central Indiana (SAS) requested leave to intervene in this proceeding.

For the reasons discussed below, the NRC Staff believes that SAS has not established that it has the requisite standing to intervene in an NRC proceeding. SAS has, however, identified specific aspects appropriate for consideration in an operating license proceeding in which it wishes

8305170003 830513
PDR ADOCK 05000546
Q PDR

DESIGNATED ORIGINAL
Certified By *Karen Sufyan*
OSOJ

to intervene. The Staff believes that unless SAS amends its Petition to establish standing its petition should be denied.

II. DISCUSSION

A. Standing

Section 2.714(a) of the Commission's Rules of Practice provides that "Any person whose interest may be affected by a proceeding and who desires to participate as a party shall file a written petition for leave to intervene". In seeking to conclude whether the requisite interest is present, the Commission has held that judicial concepts of standing are controlling. Specifically, in Pebble Springs the Commission stated that "in determining whether a petitioner for intervention in NRC domestic licensing proceedings has alleged an 'interest [which] may be affected by the proceeding' within the meaning of Section 189(a) of the Atomic Energy Act and Section 2.714(a) of the NRC's Rules of Practice, contemporaneous judicial concepts of standing should be used."^{1/} Thus, under this standard the petitioner must show (1) "injury in fact" and (2) an interest "arguably within the zone of interest" protected by the statute invoked. Id at 613.

It is well settled that "organizations ... are not clothed with independent standing to intervene in NRC proceedings. Rather, any standing which [an organization] may possess is wholly derivative in character." Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 389-397 (1979). Where an organization petitions to intervene, it must either show that the group itself has standing or that at least one of its members has

^{1/} Portland General Electric Co. (Pebble Springs Nuclear Plant, Unit 1 and 2), CLI-76-27, 4 NRC 610, 613-614 (1976).

standing and that the organization has been authorized to represent that member. The organization "must identify specifically the name and address of at least one effective member who wishes to be represented by the organization."^{2/} Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 645 (1979); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-322, 3 NRC 329 (1976). Edlow International Company, CLI-76-6, 3 NRC 563 (1976). Allied General Nuclear Service (Barnwell Fuel and Recovery Station), LBP-76-12, 3 NRC 277 (1976), aff'd, ALAB-328, 3 NRC 420 (1976); Duquesne Light Company (Beaver Valley Power Station, Unit No. 1), ALAB-109, 6 AEC 487, 488-89 (1973). See: Warth v. Seldin, 422 U.S. 490, 511 (1976) and Sierra Club v. Morton, 405 U.S. 727, 740 (1972). A demonstrable environmental or health interest of an organization member affected by the outcome of a proceeding can serve to confer standing upon an organization.^{3/} See, Marble Hill, supra.

^{2/} Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 391-2 (1979).

^{3/} A "public interest" or "special interest" group would not ordinarily possess independent standing for the purposes of NRC proceedings. See Sierra Club v. Morton, 405 U.S. 727, 735 (1972), cited with approval in Allens Creek, supra. at 391, where it was held that the Sierra Club could not derive standing based on:

"a mere 'interest in a problem,' no matter how long-standing the interest and no matter how qualified the organization is in evaluating the problem--[the interest] is not sufficient by itself to render the organization 'adversely affected' or aggrieved' within the meaning of the Administrative Procedure Act]".

Under the Atomic Energy Act and the Commission's regulations, there is no provision for private attorneys general. Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 and 2), ALAB-333, 3 NRC 804, 805 n. 6 (1976); Long Island Lighting Company (Shoreham Nuclear Power Station), LBP-77-11, 5 NRC 481, 483 (1977).

The Commission's case law has established that where a specific personal injury is alleged to result from the proceeding, sufficient standing is shown by a petitioner's residence within a fifty-mile radius of the plant, an area which could be affected by routine or accidental release of fission products from the plant. Virginia Electric Power Company (North Anna Power Station, Units 1 and 2), ALAB-146, 6 AEC 631 (1973), ALAB-522, 9 NRC 54, 56 (1979); Tennessee Valley Authority (Watts Bar Nuclear Generating Station, Unit 1), ALAB-413, 5 NRC 1418, 1421 n.4 (1977); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-125, 6 AEC 371, 372 n.6 (1973); Northern States Power Co. (North Anna Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1976). In addition to nearby residence, the pursuit of normal and recreational activities near the site has also been viewed as sufficient to support standing. Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-183, 7 AEC 222, 223-24 (1974); Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-73-10, 6 AEC 173 (1973). A residence more than 100 miles from the site is "too remote" to confer standing.^{4/}

4/ Houston Lighting and Power Company, et al. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 452 (1979); Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-397, 5 NRC 1143, 1150; Duquesne Light Company (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 244 n.2 (1973).

Where petitioners do not meet the tests for intervention as a matter of right, adjudicatory boards may exercise discretion in ruling on questions of participation where petitioners show significant ability to contribute on substantial issues of law or fact which will not otherwise be properly raised or presented, have set forth these matters with suitable specificity to allow evaluation, and demonstrate their importance and immediacy, justifying the time necessary to consider them. Pebble Springs, supra, 614-617.

Although SAS filed a timely petition to intervene, it is not at all clear who SAS purports to represent. The Petition states that the "membership of the Society lives within the service area of Public Service Indiana (PSI)" (Petition at 1) and are also ratepayers. (Petition at 1 and 2) This broad reference does not provide sufficient information to establish SAS's interest, either its own or derivative, in this proceeding. Given the location of the Marble Hill facility on the Indiana-Kentucky border and the breadth of the Applicants' service area, it is not sufficient to allege merely that SAS's members reside within the service area without specifying how far such residences might be from the site.^{5/}

The SAS Petition fails to identify even a single individual member of the Sassafras Audubon Society of South Central Indiana with the requisite

5/ To the extent that SAS purports to speak on behalf of the "citizens of Indiana in general . . ." (Petition at 2), it has been held that "a generalized grievance shared in substantially equal measure by all or a large class of citizens is normally not cognizable". *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

interest. Furthermore, it has been established that ratepayer interest alone is not adequate to establish the requisite interest to participate in an operating license proceeding.^{6/}

SAS asserts that "[its] interest in Marble Hill is well established" (Petition at 1), citing a March 1980 denial by the Commission of its post-CP request to intervene and various petitions to state utility organizations in 1982 regarding the "need [for]" and "cost of Marble Hill." SAS does not articulate how this decision establishes that a determination has been made that it has cognizable interest in this proceeding. SAS's mere exhibition of some past interest (apparently of an academic nature as opposed to "interest" in its legal sense) in Marble Hill is not a basis for intervention. Since judicial concepts of standing, including "injury in fact," are applicable in deciding whether a petitioner for intervention was entitled to intervene as a matter of right, a mere academic interest in a matter without any real impact on the person asserting it will not confer standing.^{7/}

6/ Petitioner's claim of an economic interest in the outcome of this proceeding by virtue of the fact that the members of SAS are also ratepayers is beyond the zone of interest protected by the Atomic Energy Act and the National Environmental Policy Act. Hence, the fact that members of SAS may also be ratepayers is not sufficient to establish the requisite interest in an NRC operating license proceeding. Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-424, 6 NRC 122, 128 n. 7 (1977); Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1420-21 (1977). Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976).

7/ Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 NRC 73 (1977).

In fact, SAS has not indicated an interest of the organization or of any individual members which might fall within the zone protected by the statutes governing this proceeding or otherwise establish in its petition how it or its members might be affected by the outcome of the proceeding. The failure of SAS to delineate the interests of it or its members is fatal to the Petition and its Petition should be denied absent the filing of an amendment which adequately establishes the requisite standing.

B. Specific Aspect(s) Of The Proceeding

Pursuant to 10 C.F.R. § 2.714(a)(2), a petitioner is required to identify the specific aspect(s) of the subject matter of the proceeding which the petitioner seeks to litigate. This regulation provides the Staff and the Applicant with an early indication of the matters which may be addressed at the hearing and enables the Board to determine whether a petitioner wishes to pursue matters within its jurisdiction.

Since submission of contentions is required not later than 15 days prior to the prehearing conference, (10 C.F.R. 2.714(b)), and thus is not called for at this time and SAS has not otherwise identified any aspects, per se, in its Petition, the Staff will treat, for the purpose of this response, the items characterized by SAS as "contentions which Sassafras Audubon would raise" (Petition at 2) as aspects.

SAS sets forth specific aspects which the Staff believes are appropriate. These aspects include:

- (1) fracture toughness of Marble Hill 1 and 2 containments;
- (2) pressurized water reactor steam generator tube integrity, and vibration and water hammer problems in Westinghouse Model D-Series steam generators;

- (3) seismic and dynamic qualification of safety-related electrical equipment and construction at Marble Hill;
- (4) seismic design criteria;
- (5) Class 9 and core melt accidents;
- (6) decommissioning of Marble Hill^{8/} and
- (7) emergency planning and evacuation.

One matter raised by SAS is not appropriate for consideration in this proceeding, namely, need for power. On March 26, 1982 the Commission published in the Federal Register amendments to 10 C.F.R. Part 51, effective April 26, 1982, which provided that, for NEPA purposes, need for power and alternative energy source issues will not be considered in operating license proceedings for nuclear power plants.

47 Fed. Reg 12940 (March 26, 1982). In particular, 10 C.F.R. § 51.53(c) now provides:

Presiding officers shall not admit contentions proffered by any party concerning need for power or alternative energy sources for the proposed plant in operating license hearings.

The Commission has, however, indicated that special circumstances may be shown, so as to warrant consideration of questions of need for power.^{9/}

^{8/} The uncertainty of decommissioning cost based on lack of precedent is an acceptable aspect so long as it is addressed independent of radioactive waste disposal. Pending the outcome of the so-called "waste confidence" proceeding, 44 Fed. Reg. 61372 (1979), which is reassessing the outlook for safe waste disposal, both Congress and the courts are aware of the Commission's position and have not indicated that licensing should be suspended. The issue of final disposal of radioactive waste is considered generic and may not be addressed in individual licensing proceedings. 47 Fed. Reg. 50591 (1982).

^{9/} In promulgating both its proposed and final rule, the Commission made clear that exceptions to the rule could be sought on the basis of special circumstances in accordance with 10 C.F.R. § 2.758. Proposed Rule, 46 Fed. Reg. 39441, Final Rule, 47 Fed. Reg. at 12941.

While the Petition asserts that "there is no market for Marble Hill's power in the time frame of its projected completion dates, nor in the foreseeable future" (Petition at 1) it fails to even suggest that there may be any special circumstances which might support an exception to the amended rule which would permit consideration of the need for power at the operating license stage or to follow the procedures set out in 10 C.F.R. § 2.758 for a waiver of Commission regulations in individual licensing proceedings.

III. CONCLUSION

For the reasons given above, the Staff submits that SAS has not made the requisite showing that one or more members has standing and demonstrating that has authorized SAS to represent his or her interest in this proceeding.

The Staff, however, concludes that the Petitioner has identified a number of appropriate aspects which may be considered in this proceeding. In the event that SAS fails to adequately demonstrate standing by submission of an amendment to its Petition (including one or more appropriate affidavits) and to subsequently file at least one contention pursuant to 10 C.F.R. § 2.714(b), SAS should be denied intervention in this proceeding.

Respectfully submitted,

Elaine I. Chan

Elaine I. Chan
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 13th day of May, 1983

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO THE SASSAFRAS AUDUBON SOCIETY OF SOUTH CENTRAL INDIANA PETITION FOR INTERVENTION" 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 13th day May 1983:

Ivan W. Smith, Esq., Chairman*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Charles W. Campbell, Esq.
Vice President and General Counsel
Public Service Company of Indiana
1000 East Main Street
Plainfield, Indiana 46168

Mr. Gustave A. Linenberger*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Ted R. Todd, Esq.
Attorney for the Board of
Commissioners of the County
of Jefferson, Indiana
P.O. Box 4007
427 East Main Street
Madison, Indiana 47250

Dr. Oscar H. Paris*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Thomas M. Dattilo, Esq.
311 East Main Street
Madison, Indiana 47250

Robert Gray
Rural Route #1
Hanover, Indiana 47243

Michael J. Walro, Esq.
Attorney for the Plan Board and
the Board of Zoning Appeals of
Jefferson County, Indiana
427 East Main Street
Madison, Indiana 47250

Harry H. Voight, Esq.
Leboeuf, Lamb, Leiby and MacRae
1333 New Hampshire Ave, N.W. #1100
Washington, D.C. 20036

Ralph C. Pickard
Environmental Management
Board of the State of Indiana
1330 West Michigan Street
Indianapolis, Indiana 46206

Joseph B. Helm, Esq.
Brown, Todd & Heyburn
Sixteenth Floor
Citizens Plaza
Louisville, Kentucky 40202

Dr. Harold G. Cassidy
Save the Valley, Inc.
605 West Second Street
Madison, Indiana 47250

George A. Leininger, Jr., Esq.
City Attorney, City of Madison
1327 Iroquois Drive
P.O. Box 826
Madison, Indiana 47250

Walker C. Cunningham, Jr., Esq.
1129 Kentucky Home Life Building
Office of the Jefferson County Attny
Frankfort, Kentucky 40601

Donald J. Ridings, Esq.
Attorney for Jefferson County,
Kentucky
610 Old Louisville Trust Building
Louisville, Kentucky 40202

Docketing and Service Section*
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Ms. Mary Pat Lynch, President
Sassafras Audubon Society
605 South Fess Avenue, Apt. 6
Bloomington, Indiana 47401

Mrs. Marie Horine, President
Save Marble Hill
Route 2
Lexington, Indiana 47138

Atomic Safety and Licensing
Board Panel*
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing
Appeal Panel*
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

David K. Martin, Esq.
Assistant Attorney General
Room 34, State Capitol
Louisville, Kentucky 40202

Peter F. Manning, Esq.
Assistant Director of Law
City of Louisville
200 City Hall
Louisville, Kentucky 40202

Tom Zeller, Vice President
Valley Watch, Inc.
P.O. Box 2262
Evansville, Indiana 47714

Elaine I. Chan
Elaine I. Chan
Counsel for NRC Staff