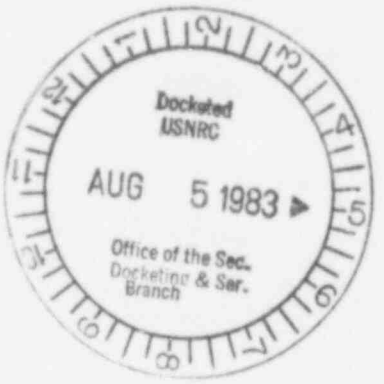
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Morton B. Margulies, Chairman
Ernest E. Hill
Dr. Paul W. Purdom



In the Matter of	)	Docket No. 50-410 OL
NIAGARA MOHAWK POWER CORPORATION, ET AL.	)	ASLBP No. 83-484-03 OL
(Nine Mile Point Nuclear Station, Unit 2)	)	August 4, 1983

MEMORANDUM AND ORDER
(Ruling on Need For a Hearing)

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Proceeding Developments

The Nuclear Regulatory Commission had published in the Federal Register of May 13, 1983, a notice that it received an application from the Niagara Power Corporation (Niagara) to operate a boiling water nuclear reactor, located on the southeast shore of Lake Ontario, in the town of Scriba, Oswego County, New York. It directed that requests for a hearing and petitions for leave to intervene in the proceeding be filed by June 13, 1983.

By order of the Atomic Safety and Licensing Board Panel, this Licensing Board was established to rule on petitions for leave to intervene and requests for hearing in the captioned matter and to conduct the proceeding in the event a hearing is ordered.

On June 7, 1983, the New York State Energy Office filed, pursuant to 10 CFR 2.715(c), a petition on behalf of the State of New York and

its interested agencies to participate in the proceeding as an interested State. Niagara and Nuclear Regulatory Commission Staff (Staff) responded on June 22 and June 23, 1983, respectively, and offered no objection to the request.

On June 10, 1983, Multiple Intervenors, an unincorporated association of industrial consumers of electrical energy submitted a petition for leave to intervene indicating support of the project. By response of June 23, 1983, Staff contended Multiple Intervenors had not made the requisite showing of interest and standing nor had it identified specific aspects of the subject proceeding as to which it seeks intervention. Staff recommended that the petition to intervene be denied unless Petitioner filed an amended petition to cure the alleged defects.

In a response of June 23, 1983, Applicant advised it was of the belief Multiple Intervenors would withdraw its petition to eliminate a hearing inasmuch as it favors prompt issuance of the operating license.

On August 1, 1983, Multiple Intervenors applied "for permission to withdraw its petition for leave to intervene subject to the condition that it be allowed to apply for late intervention if late intervention is granted to any other intervenors which properly make application for intervenor status." No further elaboration of the request was provided.

What Petitioner in effect wants is that the granting of the petition to withdraw not be with prejudice. It recognizes that any refiling it would undertake must meet the stringent requirements for

acceptance of a late filed petition, as provided for in 10 CFR 2.714(a)(1).

Petitioner does not seek anything it is not entitled to under the Commission's Rules of Practice. The changed conditions it contemplates would permit it to again file a petition for leave to intervene. Whether the petition will be accepted would depend upon the ability of Multiple Intervenors to meet the requirements of the regulation. We grant Petitioner's request for permission to withdraw, without prejudice.

This action will in no way prejudice the interests of Applicant or Staff. It will permit the disposing of the application without a hearing which benefits Applicant. Staff already has opposed Multiple Intervenors' participation. Its withdrawal will not be inconsistent with Staff's position.

The Need For a Hearing

The Atomic Energy Act of 1954, as amended, does not prescribe a mandatory hearing for obtaining the operating license which Applicant seeks. Section 189a of the Act provides, "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 or a party to the proceeding." Section 2.714 of the Code of Federal Regulations sets forth the manner in which a petitioner is to establish before the agency the interest that may be affected. The Commission has held that contemporaneous judicial concepts should be used to determine whether a petitioner has standing to intervene. Portland General Electric

Company, et al. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976). A petitioner must allege an "injury in fact" which must be within the "zone of interests" protected by the Atomic Energy Act or the National Environmental Policy Act of 1969.

With the withdrawal of the Multiple Intervenors' petition, there is but a single pending petition in the proceeding, that of the New York State Energy Office. It was filed pursuant to 10 CFR 2.715(c) which provides, inter alia, that a presiding officer will afford representatives of an interested State, county, municipality, and/or agencies thereof, a reasonable opportunity to participate and to introduce evidence, interrogate witnesses, and advise the Commission without requiring the representative to take a position with respect to the issue.

The reason given for the filing of the petition was, "The State of New York has an interest in assuring that all matters pertaining to the safety of this plant and to the energy, environmental and economic impacts of the issuance of an operating license for this plant are thoroughly considered."

The New York State Energy Office did not request a hearing in its petition. In the Staff response of June 23, 1983 to the petition, it was stated Staff counsel was authorized to report "New York State is not seeking a hearing but seeks to participate in this proceeding only in the event a hearing will be held."

No basis in fact or law has been provided for holding a hearing in the captioned matter. No body has requested a hearing, which is a

requisite under 189a of the Act, for one to be held. The filing of the New York State petition under 10 CFR 2.715(c) does not ipso facto trigger the holding of a hearing. See: Northern States Power Company (Tyrone Energy Park, Unit 1), CLI-80-36, 12 NRC 523, 527 (1980). Furthermore, the state expressly does not seek a hearing. Its interest, that the application will be thoroughly considered, is a standard procedure of the agency. There is no requirement that it be accomplished through the hearing process, absent as here, significant controverted matters. Nothing was presented indicating that serious safety or environmental matters are present.

In view of the fact that no request or need has been established for a hearing, it would not be in the public interest to hold one in this uncontested proceeding. To do otherwise would work to defeat the regulatory process.

ORDER

Upon consideration of all of the foregoing, with all judges concurring:

It is hereby ORDERED:

1. Multiple Intervenors' petition to intervene is withdrawn, without prejudice.

2. That no hearing be held in this operating license application proceeding; and

3. That necessary findings under applicable statutes and regulations be made by the Staff.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Morton B. Margulies, Chairman
Administrative Law Judge

Dated at Bethesda, Maryland

this 4th day of August, 1983.

This order is appealable under the provisions of 10 CFR 2.714a to the Atomic Safety and Licensing Appeal Board within ten (10) days after service of the Order. See 10 CFR 2.710.