UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
Philadelphia Electric Company	)	Docket Nos. 50-352
	)	50-353
(Limerick Generating Station Units 1 and 2)	)	

APPLICANT'S ANSWER TO MARVIN I. LEWIS PETITION TO INTERVENE

Preliminary Statement

On August 21, 1981 the Nuclear Regulatory Commission ("Commission" or "NRC") published a notice in the Federal Register entitled "Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), Receipt of Application for Facility Operating Licenses; Consideration of Issuance of Facility Operating Licenses; Availability of Applicant's Environmental Report; and Opportunity for Hearing" ("Notice"). 1/ In response to that Notice, a petition for leave to intervene in the proceeding was filed by Marvin I. Lewis, dated August 28, 1981. 2/

Under the current rule governing intervention in licensing proceedings, 10 C.F.R. §2.714, adopted in 1978, 3/

1/ 46 Fed. Reg. 42557 (August 21, 1981).

2/ Petitioner states that the letter was mailed on September 3, 1981.

3/ See 43 Fed. Reg. 17798 (April 26, 1978).

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a petition for intervention must demonstrate the petitioner's personal standing and designate specific aspects of the proceeding which the petitioner wishes to pursue. Under this revised rule, specific contentions are not to be filed until 15 days prior to the prehearing conference to be held 90 days after publication of the notice or such other time as the Licensing Board may prescribe. 4/

It is our position that the petitioner herein has both failed to demonstrate standing and to set forth "specific aspects" cognizable in this proceeding as required by Section 2.714 and the implementing decisions of the Commission. Petitioner has attached a set of proposed contentions to his petition. In view of the procedures set forth in 10 C.F.R. §2.714(d) regarding amendment of contentions prior to the first prehearing conference, 5/

4/ Because of the number of petitioners and the multiplicity of indicated contentions, the Applicant will move that such "specific contentions" be filed earlier in relation to the prehearing conference in order to provide the Applicant, the Staff, and the Board time to determine the real positions of the petitioners so that the prehearing conference may be meaningful. See 10 C.F.R. §2.714(b).

5/ Petitioner states that he intends to add to his contentions. It is noted that he filed a "continuation" of his contentions in a letter dated September 10, 1981, received by the Secretary on September 16, and by counsel today. It apparently was not served on the Applicant.

Applicant will reply to the contentions as such at a later date and will address contentions only insofar as they relate to the requirement of designating "aspects." 6/

Argument

Under the Commission's Rules of Practice, a petition to intervene in a licensing proceeding may be granted only if the requirements of 10 C.F.R. §§2.714(a)(3) and (d) have been satisfied. These prerequisites are set forth below:

> (a)(2) The petition shall set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene, with particular reference to the factors in paragraph (d) of this section, and the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene.
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> . . . . . .
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> (d) The Commission, the presiding officer of the atomic safety and licensing board designated to rule on petitions to intervene and/or request for hearing shall, in ruling on a petition for leave to intervene, consider the following factors, among other things:

6/ This procedure has been utilized in a number of cases. See e.g., Union Electrical Company (Callaway Plant, Unit 1), Docket No. STN-50-483, "Memorandum and Order" (February 5, 1981)(slip opinion at 3).

> (1) The nature of the petitioner's right under the Act to be made a party to the proceeding.
>
> (2) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.
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> (3) The possible effect of any order which may be entered in the proceeding on the petitioner's interest.

The Lewis petition fails to set forth with any particularity petitioner's interest in the proceeding in terms of these requirements. Instead, the petition merely makes vague references to the statute and NRC documents and alludes to some inspecified "ingestion of radionuclides from an accident at Limerick." We submit that such general statements do not establish the requisite "identifiable interest" in the proceeding or indicate how that interest would be affected by any particular outcome in the proceeding.

The decisions of the Commission and its adjudicatory boards do not provide clear guidance as to what constitutes the requisite "personal interest" required for intervention, more specifically, whether mere proximity of one's residence to the nuclear facility, absent any other nexus or showing, is sufficient. In general terms, the decisions of the Commissioners have adopted the test for standing utilized by the United States Supreme Court in requiring a demonstration of "injury in fact" as a basis for establishing

the requisite personal interest. Thus, the Commissioners have indicated that an assertion of "injury in fact" to the petitioner himself, and not a generalized grievance shared by a large class of public, is necessary for standing. In Transnuclear, Inc., CLI-77-24, 6 NRC 525 (1977), the Commissioners held as follows in deciding that petitioners lacked standing to request a hearing:

> Any right the Petitioner may have to demand a hearing in the present proceeding must be based upon Section 189 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2239. That section provides that a hearing must be granted, on the request of persons who can demonstrate an "interest [which] may be affected by the proceeding." Under the most recent Supreme Court decision on standing, a party seeking relief must "allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction." Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973), Warth v. Seldin, 422 U.S. 490, 499 (1975); see Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976). One focus of the "injury in fact" test is the concept that a claim will not normally be entertained if the "asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens . . . ." Warth v. Seldin, 422 U.S. at 499. Thus, even if there is a generalized asserted harm, the Petitioners must still show a distinct and palpable harm to them. Id. at 501. See

United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973). 7/

The Commission recently reviewed and reaffirmed these requirements for standing in rejecting intervention petitions in Westinghouse Electrical Corp. (Export to South Korea), CLI-80-30, 12 NRC 253 (1980). The Commissioners again emphasized the importance of stating some "injury in fact" to the petitioner himself as a basis for establishing the requisite personal interest in the proceeding for intervention:

> In developing the "injury in fact" requirement, the Court has held that an organization's mere interest in a problem, "no matter how long-standing the interest and no matter how qualified the organization is in evaluating the problem," is not sufficient for standing to obtain judicial review. Sierra Club v. Morton, 405 US 727, 739 (1972). The organization seeking relief must allege that it will suffer some threatened or actual injury resulting from the agency action. Linda R.S. v. Richard D., 410 US 614, 617 (1973); Warth v. Seldin, 422 US 490, 499 (1975). Simon v. Eastern Kentucky Welfare Rights Organization, 426 US 26, 40 (1976), made clear that "an organization's abstract concern with a subject that could be affected by an adjudication does not substitute

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7/ 6 NRC at 530-31 (emphasis added). While the cited proceeding was for consideration of export license applications, the Commission did not distinguish the standing requirements from those application to all proceedings, including reactor applications.

> for the concrete injury, required by article III." 8/

In certain cases, it is easy to discern that the Appeal Board has followed the approach adopted by the Commissioners in construing Section 2.714 to limit intervention to those who have particularized specific injury and do not merely seek to vindicate the general public interest. In the Sheffield proceeding, the Appeal Board stated these requirements for standing as follows:

> Both the Atomic Energy Act and the Commission's Rules of Practice confer a right to intervene in a licensing proceeding upon those who possess an "interest [which] may be affected by the proceeding." It is now settled that, in determining whether such an interest has been satisfactorily alleged, contemporaneous judicial concepts of standing are to be applied. More specifically, it must appear from the petition both (1) that the petitioner will or might be injured in fact by one or more of the possible outcomes of the proceeding; and (2) that the asserted interest of the petitioner in achieving a particular

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8/ 12 NRC at 258. Of course, the "injury in fact" requirements for an organization or individual petitioner are identical, since the organization stands in shoes of the members it purports to represent. Certainly there is nothing in the regulations to suggest that different rules exist for organizations than for individuals. Therefore, absent a statement by a petitioner as to how he has a "direct stake in the outcome" of the proceeding, his generalized allegations established only a "mere 'interest in the problem.'" Sierra Club v. Morton, 405 U.S. 727, 739 (1972).

> result is at least arguably within the "zone of interests" protected or regulated by the statute or statutes which are being enforced. Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976).
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> . . . . . .
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> As is readily apparent from the foregoing, neither petitioner has identified, let alone particularized, any specific injury that it or its members would or might sustain should the Sheffield license renewal and amendment application be denied or, alternatively, granted subject to the imposition of burdensome conditions upon the license. Rather, both petitioners seek intervention in order to vindicate broad public interests said to be of particular concern to them and their members or "contributors" [petitioner] does not claim to have members as such.
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> . . . . . .
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> . . . the test is whether a cognizable interest of the petitioner might be adversely affected if the proceeding has one outcome rather than another. And, to repeat, no such interest is to be presumed. 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 - whatever that result might be. 9/

9/ Nuclear Engineering Company, Inc., (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 739, 741, 743 (1978)(emphasis added)(footnoted omitted). While this decision arose under the old version of Section 2.714, the standing requirements under the old and new rules are the same. See also Allied General Nuclear Services (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420 (1976).

In contrast to its pronouncements in the Sheffield proceeding, other statements by the Appeal Board indicate that a lesser showing may be made for intervention by a person who resides near a nuclear facility. In Virginia Electric Power Company (North Anna Nuclear Power Stations, Units 1 and 2), ALAB-522, 9 NRC 54 (1979), the Appeal Board stated that "close proximity has always been deemed to be enough, standing alone, to establish the requisite interest."[10/]

However, in Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377 (1979), the Appeal Board stated that valid petitions have "explicitly identified the nature of the invasion of [petitioner's] personal interest which might flow from the proposed licensing action."[11/] The Appeal Board clarified its earlier North Anna decision to mean that "persons who live in close proximity to a reactor site are presumed to have a cognizable interest in licensing proceedings involving that reactor."[12/] And in Houston Lighting and Power Company (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644 (1979), the Appeal Board construed North

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10/ 9 NRC at 56.

11/ 9 NRC at 393 (emphasis added).

12/ Id. (emphasis added). The NRC Staff construes these cases to find standing for a petitioner whose residence within 50 miles of the facility "could be affected by routine or accidental release of fission products from the plant where a specific personal injury is alleged to result from the proceeding." NRC Staff Response at 3 (September 17, 1981).

Anna to require allegations or residence proximate to the facility "coupled with [petitioner's expressed concern about injury to his person and property should the plant malfunction . . . ."[13/]

In the Palisades proceeding, the Licensing Board similarly construed these decisions to mean that "close proximity" to the facility merely raised a presumption of standing and that further demonstration of a "cognizable interest personal" to the intervenor is necessary for standing. The Board said:

> Conceding that those who live within close proximity to a nuclear facility are presumed to have a cognizable interest, the Staff asserts that it is important to recognize that the "close proximity" test only raises a presumption of standing. What is really "presumed" by the "close proximity" test is that the potential litigant will in fact be able to show an injury to an interest protected by the Atomic Energy Act. If he or she cannot, then the presumption fails.

13/ 9 NRC at 646 n.8 (emphasis added).

> The Staff position is amply supported by at least two cases [citing and discussing Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 393 (1979); Dairyland Power Cooperative (LaCrosse Boiling Water Reactor), LBP-80-26, 12 NRC 367, 373 (1980)] . . . .
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> Thus, the Union cannot assert standing in this case by virtue of the "close proximity" test unless it can also show that it has an interest protected by the Atomic Energy Act (a "cognizable interest") that has been adversely affected by the Director's Order in a way that is environmenta ly or safety-related. 14/

Accordingly, there is a lack of clarity in the decisions of the Appeal Board as to the cognizable interest which must be demonstrated to establish standing to intervene in a reactor licensing proceeding. Nonetheless, it is submitted that the decisions of the Commission have definitively required a personalized showing of actual or putative harm to the petitioner himself. Such a showing cannot be made simply on the basis that a petitioner resides within a designated distance from the facility. For this reason, Applicant submits that petitioner herein has failed to "show injury that has occurred or will

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14/ Consumers Power Company (Palisades Nuclear Power Facility, Docket No. 50-255 SP "Memorandum and Order Ruling on Petition to Intervene," (July 31, 1981)(slip opinion at 11-12)(emphasis added).

probably result from the action involved" and therefore lacks standing to intervene.[15/] The petition does not, as required by the Commission's regulations, set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the outcome, or any facts which would establish the nature of petitioner's right under the Act to be made a party.[16/] Despite allegations of proximity to the plant, petitioner has failed to show any "cognizable interest" under Section 189 of the Atomic Energy Act sufficient to demonstrate his standing.

In an effort to buttress his standing, petitioner has set forth a number of other items as a basis for intervention. These, too, however, are insufficient to establish standing. For example, petitioner asserts that the possible bankruptcy of the Applicant as a result of a serious accident at Limerick would endanger investments made by his pension fund. Under the NRC decisions discussed above, such an

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15/ In any event, Applicant wishes to preserve the point for the purpose of possible judicial review.

16/ Petitioner's vague assertion that "I am in the 'plume injestion [sic] zone'" is clearly insufficient to establish any kind of concrete, particularized interest in the proceeding. It is clear that the ingestion pathway Emergency Planning Zone referred to in 10 C.F.R. Part 50, Appendix E relates to the area in which possible actions by governmental agencies for control of foodstuffs may be necessary and has no relation per se to the mere presence of an individual within that zone.

interest is far too speculative and outside the "zone of interests" protected by Section 189 of the Atomic Energy Act to permit intervention. The effect of licensing Limerick on a pension fund investment is even more remote and beyond the concerns cognizable under the Atomic Energy Act than, for example, the possibility of electric power rate increases, which has uniformly been rejected as a basis for intervention in NRC proceedings. 17/

Speculative and indirect injury to similar economic interests has been rejected as a basis for intervention in several other proceedings. In the TMI-1 (Restart) proceeding, the Licensing Board denied intervention where petitioners had merely asserted an interest as that of "large users of electricity who are adversely affected by the shutdown of TMI-1 because this has raised the cost of electricity to licensee's customers," where the costs allegedly "have disadvantaged their position

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17/ Portland General Electric Company (Pebble Spring Nuclear Plant, Units 1 and 2), CLI-76-21, 4 NRC 610, 614 (1976); Public Service Company of Oklahoma (Black Fox, Units 1 and 2), LPB-77-17, 5 NRC 657, 659 (1977), aff'd, ALAB-397, 5 NRC 1143, 1147 (1977); Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), Docket No. 50-289 (Restart), "Memorandum and Order Ruling on Petitions and Setting Special Prehearing Conference" (September 21, 1979)(slip opinion at 7).

vis-a-vis competitors serviced by other utilities, caused the indefinite postponement of expansion plans and raised the possibility of cutbacks in production with concommitant furloughs of employees."[18] Similarly, intervention sought because of the risk of losing future options for land development and investment in real estate has been denied.[19]

Petitioner also states without providing any specificity that he often travels in the Limerick area for business and pleasure. Such sporadic visits are not a basis for intervention. As one Licensing Board stated, "where the involvement is intermittant [sic] or irregular, the potential harm becomes too speculative and remote" to permit intervention.[20]

Finally, the petitioner fails to designate "the specific aspect or aspects of the subject matter of the proceeding" for which petitioner seeks intervention. The body of the petition is simply a statement of generalized health and safety concerns. As the Board stated in the Midland

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18/ Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), Docket No. 50-289 SP (Restart), "Memorandum and Order Denying Petition to Intervene of Victaulic Company, et al" (September 2, 1980) (slip opinion at 3).

19/ Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 242-43 (1980); Consumers Power Company (Big Rock Point Nuclear Plant), Docket No. 50-155, "Memorandum and Order" (September 25, 1979).

20/ Union Electric Company (Callaway Plant, Unit 1), Docket No. STN-50-483, "Special Prehearing Conference Order" (April 21, 1981)(slip opinion at 3).

proceeding, the requirements for properly designating such "aspects" are unclear but likely "narrower than a general reference to our operating statutes." 21/ Further, as the Licensing Board stated in the TMI-1 (Restart) proceeding, any subject matter alleged as an aspect must be "within the scope of the proceeding as set forth in the notice of hearing." 22/ To the extent that the proposed contentions may be deemed to express petitioner's designated "aspects," many of the matters are beyond the jurisdiction of the Board and therefore fail to satisfy even the minimal requirements. 23/

21/ Consumers Power Company (Midland Plant, Units 1 and 2), LBP-78-27, 8 NRC 275, 278 (1978).

22/ Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), Docket No. 50-289 (Restart), "Memorandum and Order Ruling on Petitions and Setting Special Prehearing Conference" (September 21, 1979) (slip opinion at 6).

23/ We recognize the distinction made by the Commission between "aspects" and "contentions" in Section 2.714, and that objections to contentions will be presented later in due course (Midland, supra, 8 NRC at 278). However, many of the "aspects" raised by the petitioner herein are simply not cognizable by the Licensing Board in this proceeding as beyond its jurisdiction. Thus, Contentions 100 through 105, pertaining to allegations that an electromagnetic pulse may result from explosion of a nuclear device in the atmosphere, are clearly barred by 10 C.F.R. §50.13. See Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), Docket No. 50-466, "Order (July 22, 1981)(slip opinion at 2 n.1).

Contentions 110 through 112 relate to purported allegations by Metropolitan Edison management about NRC test procedures. These matters are not cognizable under this Licensing Board's jurisdiction.

Contentions 117 through 120 relate to concerns regarding a possible accident in the transportation of spent fuel.

(Footnote 23/continued on next page).

Conclusion

For the reasons more fully discussed above, petitioner has failed to satisfy the requirements of establishing a personal interest in the outcome of the proceeding and designating those aspects in which petitioner has such an interest. Accordingly, the petition to intervene should be denied.

Respectfully submitted,

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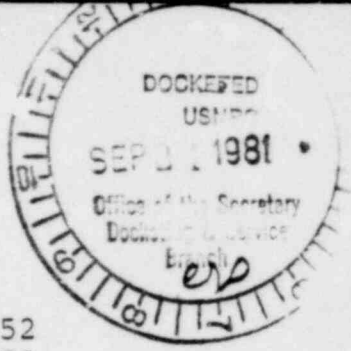
September 18, 1981

23/ (continued)

Transportation of spent fuel away from Limerick would have to be authorized by a separate license under 10 C.F.R. Part 70, and is therefore beyond the scope of the instant proceeding. Philadelphia Electric Company (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-216, 8 AEC 13, 30 (1974).

The other contentions alleged by petitioner are simply too vague or unintelligible to constitute appropriate "aspects" of the proceeding. For example, petitioner's allusion to "poor testing practices" in Contention 111 is entirely incomprehensible.



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NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
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PHILADELPHIA ELECTRIC COMPANY	)	Docket Nos. 50-352
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(Limerick Generating Station, Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of (1) "Applicant's Answer to Marvin I. Lewis Petition to Intervene," (2) "Notice of Appearance for Troy B. Conner, Jr.," (3) "Notice of Appearance for Mark J. Wetterhahn" and (4) "Notice of Appearance for Robert M. Rader" dated September 18, 1981, in the captioned matter have been served upon the following by deposit in the United States mail this 18th day of September, 1981.

Judge Lawrence J. Brenner
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U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Judge Peter A. Morris
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