

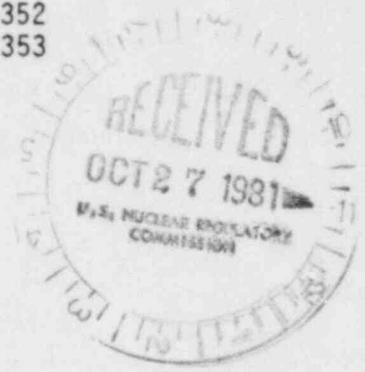
10/26/81

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
PHILADELPHIA ELECTRIC COMPANY)
(Limerick Generating Station,)
Units 1 and 2)

Docket Nos. 50-352
50-353



NRC STAFF'S COMMENTS ON THE "ASPECT"
REQUIREMENTS OF 10 C.F.R. § 2.714

INTRODUCTION

By its "Memorandum and Order Setting Schedule for Submission of Contentions and other Preliminary Information" (October 14, 1981 hereafter, "Order"), the Atomic Safety and Licensing Board invited the NRC Staff, the Applicant, and any petitioners for intervention wishing to comment, to file comments with the Board on its preliminary view of "general lack of materiality of the 'aspect' requirement" of 10 C.F.R. § 2.714(a)(2).^{1/} For the reasons developed below, the Staff does not agree with the Board's preliminary view.

DISCUSSION

The Staff has previously discussed the pleading requirements of the

1/ Order, at 14.

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Commission's regulation on intervention, 10 C.F.R. § 2.714.^{2/} The Licensing Board presently has pending before it petitions for intervention filed under § 2.714(a)(1), which must satisfy the requirements of § 2.714(a)(2). Consistent with the structure of § 2.714, the Board has established an additional two-stage process for determination of the adequacy of the intervention papers filed and to be filed:

(1) supplementary information on "interest" is to be filed by certain petitioners by October 26, 1981^{3/} to enable the Board to rule shortly thereafter on the standing of petitioners^{4/} and (2) contentions are to be filed by November 17, 1981.^{5/} Having established this two-stage process the Board invited comments on its preliminary view that

there is no purpose served and therefore no requirement to consider "aspects" (in addition to interests and how they may be affected) in advance of and separate from contentions when dealing with a timely petition to intervene as of right.^{6/}

Section 2.714(a)(2) requires a petitioner to set forth its "interest" in the proceeding and "how that interest may be affected by the results of the proceeding". By demonstrating its interest in the proceeding and "how that interest may be affected by the results of the

^{2/} "NRC Staff Response to Petitions to Intervene and Request for Hearing..." (October 8, 1981) at 2-5.

^{3/} Order, at 5.

^{4/} Id., at 2.

^{5/} Id.

^{6/} Id., at 13-14.

proceeding", a petitioner would establish its "standing" to intervene. The Commission has adopted judicial concepts of standing, which require that the petitioner show that the action under consideration by the Commission could cause it injury-in-fact and that the alleged injury is within the zone of interests protected by the statutes governing the proceeding.^{7/}

The requirement to plead "the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene" is also set forth in 10 C.F.R. § 2.714(a)(2). The identification of aspects relates to the subject matter of the proceeding, rather than to the petitioner's interest in the results of the proceeding. It can be determined apart from the petitioner's standing and it is only this element which is the focus of the Board's preliminary view. The regulation requires both matters to be addressed in an intervention petition.

Prior to 1978 amendments to § 2.714, a petitioner was required to include a statement of its contentions with its initial petition.^{8/} The 1978 amendments removed this provision because the Commission considered it an unreasonable burden to require petitioners to file contentions within thirty days of the notice of hearing (or of opportunity for

^{7/} See cases discussed in the Staff's October 8, 1981 Response, at 2-5.

^{8/} See 43 Fed. Reg. 17798, 17799 (April 26, 1978).

hearing).^{9/} In its place, the Commission permitted petitioners to file supplements to their petitions which included lists of their contentions up until fifteen days prior to the special prehearing conference held pursuant to § 2.751a.^{10/} As part of these amendments, the Commission also provided that petitions could be amended without leave of the Board up until fifteen days prior to the special prehearing conference.^{11/}

The Licensing Board cites the Commission's amendments to Section 2.714 as providing a basis for the conclusion that no purpose is served by requiring that petitioners identify in their intervention petitions the aspects of the proceeding which they intend to pursue if permitted to intervene. The Commission did not, however, delete or otherwise alter the aspect requirement when it amended § 2.714 in 1978. If anything, the requirement took on greater significance as a result of the amendments, since aspects were now pleaded in advance of contentions. Under previous practice, a licensing board would have had before it in one document both an identification of aspects and a list of contentions. Since the licensing boards had to determine that at least one contention was adequately pleaded, the aspects had no independent role in delineating

^{9/} Id.

^{10/} 10 C.F.R. § 2.714(b).

^{11/} 10 C.F.R. § 2.714(a)(3).

the issues to be litigated.^{12/}

The Staff believes that the aspect requirement now serves at least two important functions. First, it gives the Staff and Applicant an early indication of the matters which they may have to address in testimony at the hearing. Second, it enables a board to determine whether the aspects which a petitioner wishes to pursue may not be considered in the proceeding due to such factors as their being outside the jurisdiction of the board.^{13/} There is no reason why resolution of such jurisdictional questions should await the pleading of contentions, since refinement of the aspects into contentions could not remove the jurisdictional obstacle.

For purposes of determining whether the aspect requirement has been met, Staff believes that a board need only determine whether a petitioner has adequately identified an aspect of the subject matter of the

^{12/} Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 194 (1973).

^{13/} See, e.g., Babcock & Wilcox (Application for Consideration of Facility Export License), CLI-77-18, 5 NRC 1332, 1348 (1977). Board review of the aspects at the stage they are pleaded might also assist it in determining whether they are within the zone of interests protected by the statutes governing the proceeding. See e.g., Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-26, 4 NRC 610, 613-14 (1976); Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-292, 2 NRC 631, 637-643.

proceeding which it wishes to raise.^{14/} Determination of precisely what issues it may or may not litigate must await the later ruling on contentions.

The Board's preliminary view is also influenced by the paucity of Commission decisions defining aspects and by the lack of a precise definition in the decisions which have been rendered.^{15/} Admittedly, aspect is not a concept which has been well defined by precedent. But that does not warrant the Board's apparent intent to read it out of the regulation. As noted above, had the Commission intended to confine the petition to intervene to matters of standing, it could have done so by deleting the aspect requirement. But it did not do so.

The Staff interprets "aspect" to mean an area of interest which the petitioner has within the subject matter of the proceeding and as to which it intends to raise contentions. The Staff has taken the position in this proceeding that such phrases as "emergency planning" and

^{14/} Consumers Power Company (Midland Plant, Units 1 and 2), LBP-78-27, 8 NRC 275, 278 (1978).

^{15/} The Midland Board simply stated its belief that an aspect is "probably broader than a 'contention' but narrower than a general reference to our operating statutes". LBP-78-27, supra, n. 14, 8 NRC 277-78. The TMI-1 (Restart) Board interpreted aspect "to mean simply that the petitioner must indicate its general position on the subject matter as to which it seeks to intervene." Metropolitan Edison Company, et al. (Three Mile Island Nuclear Station, Unit No. 1), "Memorandum and Order Ruling on Petitions..." (Unpublished, September 21, 1979).

"population density" constitute adequate identification of aspects of the subject matter of the proceeding which petitioners intend to probe.^{16/} Although not nearly as detailed as contentions, such phrases serve the purposes (discussed above) of the aspect requirement.^{17/}

CONCLUSION

For the reasons discussed above, the Staff cannot agree with the Board's preliminary view that no purpose is served by the aspect requirement and that the Board is, therefore, under no requirement to consider aspects in advance of and separate from its consideration of contentions. We believe that all of the affected parties would find it most helpful to have the Board rule (as it has indicated it hopes to do) on the standing of petitioners shortly after receiving the amended petitions requested in its Order.^{18/} Those rulings should, however,

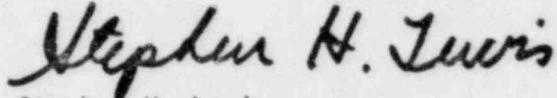
^{16/} "NRC Staff Response to Petitions to Intervene and Request for Hearing...." (October 8, 1981), at 6, 10. Where petitioners have attached proposed contentions to their petitions and have not otherwise identified aspects, the Staff has reviewed those contentions for the limited purpose of determining whether they contain adequate articulation of aspects. Id., at 8-9, 22.

^{17/} Consistent with these purposes, the contentions to be filed by each petitioner must fall within the aspects identified by it.

^{18/} The Staff may wish to file answers to the amended petitions filed by October 26, 1981, pursuant to Board's Order. In order to enable the Board to rule as promptly as possible on standing, we will file answers as soon after receipt of the amended petitions as we are able.

address all of the elements required under § 2.714(a)(2) to be pleaded in petitions to intervene, including rulings on the adequacy of the identification of aspects.

Respectfully submitted,

A handwritten signature in cursive script that reads "Stephen H. Lewis".

Stephen H. Lewis
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 26th day of October, 1981

October 26, 1981

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

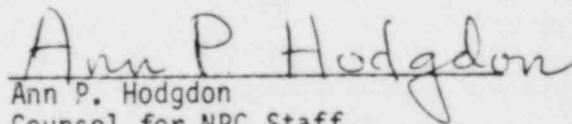
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Units 1 and 2))	

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. 2.713(a), the following information is provided:

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Ann P. Hodgdon
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Dated at Bethesda, Maryland
this 26th day of October, 1981

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S COMMENTS ON THE "ASPECT" REQUIREMENTS OF 10 C.F.R. § 2.714" 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 26th day of October, 1981:

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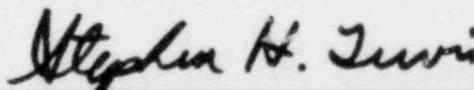
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