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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of...

Docket Nos.

Arizona Public Service
Company, et. al., (the
Palo Verde Nuclear
Generating Station,
Units 1, 2 and 3)

STN 50-528/
529/530

THE ATTORNEY GENERAL'S RESPONSE TO JOINT
APPLICANT'S ANSWER AND NRC STAFF RESPONSE
TO MOTION TO PARTICIPATE AS INTERESTED
AGENCY OF THE STATE OF NEW MEXICO



On September 17, 1981 the A.G. filed a Motion To Participate As An Interested Agency Of The State Of New Mexico pursuant to 10 CFR Section 2.715 (c). On October 2, 1981 Joint Applicants filed an Answer thereto which requested denial of the Motion or, in the alternative, a statement of specificity on the subject matters and issues to be addressed by the A.G. On October 7, 1981 the NRC Staff filed a Response which did not object to the A.G's participation but which requested a statement of specificity and a delineation of the A.G.'s right to discovery.

On October 29, 1981 Judge Lazo, the Presiding Officer gave the

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Attorney General of the State of New Mexico (AG) permission to file his Response in accordance with 10 CFR Section 2.730 (c). Judge Lazo also set the Prehearing Conference of November 18, 1981, as the time for a ruling on the A.G.'s Motion to Participate.

Joint applicants do not challenge the fact that the AG is a bona fide representative of the State of New Mexico. Joint applicants' argument is that the AG must set forth "a cognizable interest upon which it predicates its participation in the proceeding". It characterizes the AG's Motion as being solely based on the economic interests of the New Mexico ratepayers of PNM and EPEC and puts forth that these interests are not cognizable under the Atomic Energy Act.

The AG contends that he has an unconditional right to participate in this proceeding as a State representative under 10 CFR Section 2.715 (c) and the Atomic Energy Act, 42 USC Section 2021 (1); that if the Board should determine otherwise that the AG's participation is within the unlimited discretion of the Board; and that even if the Board should determine that the 10 CFR Section 2.714 "zone of interests" test is applicable that the AG meets that test.

1. Statutory right to Participate

The Atomic Energy Act (42 USC Section 2011 et seq) addressed the state-federal relationship in Section 2021 et seq. 42 USC Section 2021 (a) states:

It is the purpose of this section (1) to recognize the interests of the States in the peaceful uses of atomic energy...and (2) to recognize the need...for cooperation between the States and the Commission...

42 USC Section 2021 (c) (1) reserved for the federal government the regulation of the construction and operation of production and utilization facilities as it relates to radiation safety. Congress, in turn, recognized the right of the States to participate in the regulatory process in 42 USC Section 2021 (1). This section is the statutory authority for 10 CFR Section 2.715 (c) and reads:

With respect to each application for Commission license authorizing an activity as to which the Commission's authority is continued pursuant to subsection (c), the Commission shall give prompt notice to the State or States in which the activity will be conducted of the filing of the license application; and shall afford reasonable opportunity for State representatives to offer evidence, interrogate witnesses, and advise the Commission as to the application without requiring such representatives to take a position for or against the granting of the application.

State is defined in 42 USC Section 2021 (n) to mean "any state."

Since the enactment of this statute and its implementing regulation no State has been denied an opportunity to participate in proceedings before the NRC.

This is because:

not merely as a matter of regulation but as a matter of congressional command as well, a State must be given 'a reasonable opportunity' to 'advise the Commission' on the issues presented by a construction permit or operating license application...The short of the matter is that both statute and regulation explicitly authorize States to participate in our licensing proceedings and to "advise the Commission on the matters considered therein." Gulf States Utilities Company (River Bend Station, Units 1 and 2 ALAB-317, 3 NRC 175, 178-180 (1976)). (See also Application by General Electric Co. (Southwest Experimental Fast Oxide Reactor) Docket No. 50-231, 3 AEC 40-41 (1965) and Project Management Corporation (Church River Breeder Reactor Plant) ALAB-354 4 NRC 383, 393 (1977)).

"Section 2.715 (c) appears to have been formulated to accommodate a State who desires to participate in a proceeding of this kind." Pacific Gas and Electric (Diablo Canyon Nuclear Power Plant) Docket No. 50-275, 4 AEC 89 (1968). The key word here is desire. Section 2.715 (c)'s use of the word "interested" is the common, ordinary use of that word, an expressed desire. Nowhere in Section 2.715 (c) is "interested" defined or are tests therefore set out. Section 2.714 is not applicable in light of the "special consideration" given the States in the regulations and the Statute. (See Application by General Electric Co., supra.) The AG as representative of the State of New Mexico has expressed such an interest or desire.

42 USC Section 2201 speaks nowhere of a "zone of interests" requirement. Section (a) (1) statutorily recognizes the States' interests in proceedings under the Atomic Energy Act. In Section (1) special notice is required to be given to the State or States in which the activity is conducted but the mandatory opportunity for participation is "for State representatives" without exception and State is defined in Section (N) as all states. Therefore the AG has the unconditional statutory right to participate and the NRC has been mandated to allow such participation.

2. In the alternative, the Board should exercise its unlimited discretion

It has been the Commission's long standing practice to permit states whose borders are close to the site of a proposed nuclear facility to participate under Section 2.715 (c) (See Exxon Nuclear Co. Inc. (Nuclear Fuel Recovery and Recycling Center) ALAB-447, 6 NRC 873, 875, 878, 878 (1977). Footnote 8 on page 875-76 lists 5 such cases. In addition, See Allied-General Nuclear Services et al (Barnwell Fuel Recovering and Storage Station) 2 NRC 277, 291, (1976).)

The Commission has also allowed participation pursuant to Section 2.715 (c) to States which do not have a common border with the State where the activity will be conducted. (Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station) 4 AEC 776 (1972), 6 AEC 130 (1973) and Exxon Nuclear Company supra and

at 6 NRC 518, 523, 524 (1977).

The Exxon case is the only case which counsel for the AG has found where the issue of the definition of "interested state" was addressed. Joint applicant's cite the dissenting opinion therein as controlling. In fact the majority opinion therein is the relevant consideration here. The Board below held that the Atomic Energy Act "require (s) that a reasonable opportunity be afforded for state representatives to participate" and allowed participation under 10 CFR Section 2.715 (c) on the assertion that the State of California would secure valuable information relevant to its own determination under California law. (6 NRC 873 supra at 523, 524). The Appeal Board affirmed, (6 NRC 873 supra at 879, 880)

The Appeal Board's decision held that the Atomic Energy Act gave the Commission unlimited discretion as to States other than the State of location and that the Commission delegated such discretion to the Licensing Boards through 10 CFR Section 2.715 (c). The Appeal Board noted the Commission's direction that "the participation of an interested sovereign state in our licensing process, as a full party or otherwise, is always desirable..." (Id., at pg. 876).

The Appeals Board found that California had a direct and significant interest based on its need to determine the availability of reprocessing or storage facilities. It made no determination whether

or not the need for information was a ground upon which to base a right to participate but Mr. Salzman stated:

"even were the question a close one, I would not come down on the side of restricting the right of state governments to participate in our proceedings. In the long run public confidence in our ability to regulate nuclear power responsibility in an evenbodied, dispassionate manner is ill-served by closed hearings and a crabbed reading of regulations."

(Id. at p. 879)

It is thus clear that the tests derived under 10 CFR Section 2.714 are not applicable in the present case and that the cases cited by the Joint Applicants are therefore not on point. Mr. Salzman stated this clearly in saying: "in our proceedings a state agency is not to be analogized to a private party but enjoys a more advantageous position precisely because it represents an aspect of the public interest." (Id.) This has been demonstrated in cases where the State has been denied intervention under Section 2.714 but granted participation rights under Section 2.715 (c). (See Consumers Power Company (Midland Plant Units 1 and 2) LBP-78-27,8 NRC 275, 278 (1978))

The AG's Motion to Participate set forth a declaration by the representative of the State of New Mexico that the public interest of said State requires participation in this proceeding. Even if the AG did not properly set forth such interests participation should be

granted in deference to the State's judgement and the findings of Congress and the Commission that cooperation with the States and broad public participation are goals of the Atomic Energy Act. The NRC's "regulatory responsibilities can best be carried out by allowing intervention as a matter of discretion to some petitioners who do not meet judicial standing tests." Portland General Electric Co. (Pebble Springs Nuclear Plan, Units 1 and 2) CLI-76-27, 4 NRC 610, 616 (1976).

The ratepayer interest set forth in the AG's motion does directly relate to the issue of the Joint Applicants' financial qualifications to operate and decommission PVNGS. The AG has shown his familiarity with the finances of applicants PNM and EPEC. The AG feels that the participation of the AG will be a valuable contribution to the Commission's decision in this area. Such a contribution is a significant factor weighing in favor of the Board granting participation. (See Id. and Exxon 6 NRC 873, 881 *supra*.)

Finally, the AG has asked for leave to amend his Motion to Participate in order to more clearly set forth the State's interests, the value of the AG's contribution and the AG's willingness to cooperate to avoid any delays to these proceedings. If the amended motion is accepted the AG believes that even under the most stringent tests it will have the right to participate in this proceeding.

WHEREFORE, the AG respectfully requests that the Board grant the Motion and/or Amended Motion to participate of the New Mexico Attorney General.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that copies of The Attorney General Of The State Of New Mexico's Motion For Leave To Amend His Motion To Participate As An Interested Agency Of The State Of New Mexico and The Attorney General's Response To Joint Applicant's Answer and NRC Staff Response To Motion To Participate As An Interested Agency Of The State Of New Mexico have been served upon the following listed persons by deposit in the United States mail, properly addressed and with postage prepaid, this 14 day of November, 1981.

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