UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
WASHINGTON PUBLIC POWER SUPPLY SYSTEM	)	Docket No. 50-397 (Construction Permit Extension)
	)	
(WPPSS Nuclear Project No. 2)	)	

NRC STAFF ANSWER TO A REQUEST FOR HEARING
FILED BY THE COALITION FOR SAFE POWER

William D. Paton
Counsel for NRC Staff

Dated: March 15, 1982

DESIGNATED ORIGINAL

Certified By

3/15/82

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INTRODUCTION

Washington Public Power Supply System (WPPSS) is the holder of Construction Permit No. CPPR-93 issued on March 19, 1973 for construction of the WPPSS Nuclear Project No. 2 which is presently under construction on the Hanford Reservation in Benton County, Washington. In accordance with section 185 of the Atomic Energy Act, 42 U.S.C. § 2235 (1976), the construction permit for this facility stated the earliest and latest dates for completion of construction.[1/] On August 29, 1978, the construction completion date for this facility was extended to

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1/ Section 185 of the Atomic Energy Act provides that if construction is not completed by the latest completion date, the construction permit shall expire, and all rights thereunder be forfeited "unless upon good cause shown, the Commission extends the completion date." This provision is similarly codified in the Commission's regulations at 10 C.F.R. § 50.55(b).

December 1, 1981, and thereafter on September 4, 1981 the Permitee filed a second request, pursuant to 10 C.F.R. § 50.55(b), seeking an extension of that construction completion date until February 1, 1984. In its latest request, the Permittee cited as good cause for the extension: (i) changes in the scope of the project, (ii) construction delays, (iii) strikes by portions of the construction work force, (iv) changes in the plant design, and (v) delays in the delivery of equipment and materials. Following a review of this request by the Staff, the Director of the Division of Licensing granted the requested amendment on January 27, 1982, concluding inter alia that the "[a]ction involves no significant hazards consideration; good cause has been shown for the delays; and the requested extension is for a reasonable period ..." The Director's authorization extended the latest completion date for CPPR-93 be extended from December 1, 1981 to February 1, 1984. 47 Fed. Reg. 4780 (1982).[2/]

2/ On July 26, 1978 the Commission published in the Federal Register a Notice of Receipt of Application for Facility Operating License; Notice of Consideration of Issuance of Facility Operating License; and Notice of Opportunity for Hearing for the WPPSS-2 Nuclear Power Plant. 43 Fed. Reg. 32338 (1978). In response to this notice a petition for leave to intervene was filed by two individuals on their own behalf and on behalf of a group called Hanford Conversion Project. On March 6, 1979 an Order was entered by the Licensing Board appointed to rule on this petition concluding that none of the Petitioners had met the interest requirements of 10 C.F.R. § 2.714 and denying the petition. Matter of Washington Public Power Supply System (WPPSS Nuclear Project No. 2), LBP-79-7, 9 NRC 330 (1979). No appeal was taken from this decision by any of the Petitioners. The present application for an operating license is thus uncontested.

On February 22, 1982 - some twenty days after notice of the action of the Director of Licensing granting the amendment was published in the Federal Register - the present Petitioner, the Coalition for Safe Power (Petitioner) filed a Request for a Hearing (petition) on that action. The Petitioner states that it is a non-profit citizens' organization founded in 1969 to work for safe energy. Petition at 1. The petition further sets forth the interest of its members in this action and in general terms the health and safety, management and financial matters it is seeking to litigate. The Petitioner concludes that its request for a hearing meets the requirements of 10 C.F.R. § 2.714 and is a matter of great public interest in the region and therefore should be granted. Petition at 4.

After a close review of the petition - as currently drafted - it is apparent that the petition does not satisfy the requirements of 10 C.F.R. § 2.714 for the reason set forth below - even if it is assumed that such provisions apply in this instance.[3/]

3/ Technically, the provision of 10 C.F.R. § 2.714, are not applicable to the present request for a hearing, in that the extension of the construction permit to which the request is directed is not an action specified in 10 C.F.R. § 2.700. This provision expressly provides that: "The general rules in this subpart [Subpart G] govern procedure in all adjudication initiated by the issuance of an order to show cause, an order pursuant to § 2.205(e), a notice of hearing, a notice of proposed action issued pursuant to § 2.105, or a notice issued pursuant to § 2.102(d)(3)." Nevertheless, the Staff believes that the criteria of 10 C.F.R. § 2.714 and the cases applying this provision are useful tools to aid in the evaluation of this petition and that their consideration for this purpose is not inappropriate.

DISCUSSION

1. Section 189(a) of the Atomic Energy Act, 42 USC 2239(a)(1976), provides that in any "proceeding" for the "amending" of a license, "[T]he 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 as a party to such proceeding".[4/] Similarly, Section 2.714(a) of the Commission's Rules of Practice provide 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 prescribed by both the statute and the regulation are 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

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4/ In its Answer in Opposition to the present Request for a Hearing, the Permittee has argued that "[A]n opportunity for hearing does not exist under Section 189(a) of the Atomic Energy Act, as amended, 42 USC § 2239, if the Commission determines (as it did for the WNP-2 amendment) that the license amendment involves 'no significant hazards consideration.'" Answer at 4. While portions of the legislative history of Section 189 of the Act could be read as supporting this conclusion, (See in part, Brief for the United States at 15-32, Nuclear Regulatory Commission v. Sholly, Nos. 80-1640 and 80-1656 (U.S., October Term 1980)) as could certain portions of judicial decisions considering this statute (See e.g. Brooks v. Atomic Energy Commission, 476 F. 2d 924, 926 (D.C. Cir. 1973); Union of Concerned Scientists v. Atomic Energy Commission, 499 F. 2d 1069, 1084, n.36 (D.C. Cir. 1974)) the Staff does not urge this argument.

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."[5/] 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 statue invoked. Id at 613.

Similarly, when an organization requests a hearing, it must either show that it has standing,[6/] or that at least one of its members has

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

6/ 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 Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station), ALAB-535, 9 NRC 377, 391 (1979) where it was held that the Sierra Club could not derive standing based on:

> "a mere 'interest in a problem,' no matter how longstanding 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, 806 n. 6 (1976); Long Island Lighting Company (Shoreham Nuclear Power Station), LBP-77-11, 5 NRC 481, 483 (1977).

standing in his or her own right and that the member has authorized the organization to represent its interests. Allens Creek, supra at 389-397. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 64[illegible]79); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-322, 3 NRC 328 (1976). See also Worth v. Seldin, 422 U.S. 490 (1975). 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. See, e.g., Marble Hill, supra. Where an organization seeks to establish standing based on the asserted interests of its members, the specific members must be identified, how their interest may be affected must be shown and the member's authorization to the organization must be established.7/ Absent express authorization, groups may not represent other than their own members, and individuals may not assert the interest of other persons. Tennessee Valley Authority (Watts Bar Nuclear Generating Station, Unit 1), ALAB-413, 5 NRC 1418 (1977); Long Island Lighting Company (Shoreham Nuclear Power Station), LBP-77-11, 5 NRC 481, 483 (1977).

2. In seeking to meet the above requirements for standing, the petitioner has asserted that "[t]he interests of the Coalition are predicated on the interest of its members". Request at 2. Moreover,

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7/ 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).

the Petitioner asserts that the interest of its members are directly affected by the present action in that: (i) certain of its members live within close proximity to the Columbia River on which the facility is located; (ii) its members are ratepayers whose electric bills include payments for WNP-2; (iii) its members live, work, travel and recreate in close proximity to WNP-2; (iv) its members eat foodstuffs grown and produced in areas that would be impacted upon negatively by the potential operation, normal or otherwise, of WNP-2; and (v) the Coalition's work itself is conducted in part in Richland, Washington due to the location of the Local Public Document Room there. Request at 2.[8/] In addition, the petition states that at least one member resides within a 20 mile radius of the WNP-2 plant. Ibid.

3. In weighing these expressions of interest by the above judicial standards, many of the above grounds for standing are, on their face, deficient as a matter of law and thus require limited discussion. Specifically, the law is clear, we believe, that the economic interest of ratepayers - asserted by the petitioner herein - simply does not come within

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8/ The petitioner has also attached two affidavits, one of Mr. William E. Rupel the other of Mr. M. Terry Dana. Both affiants state that they are members of the Coalition for Safe Power and that they authorize the Coalition, through its officers and attorneys, inter alia to represent their interest before the Nuclear Regulatory Commission on any matter pertaining to nuclear units 1, 2 or 4 of the Washington Public Power Supply System. Mr. Dana states that he lives in Richland, Washington. Mr. Rupel states his residence to be Yakima, Washington.

the "zone of interests" protected by the Atomic Energy Act.[9] Similarly, Petitioner's argument that its members eat foodstuffs grown and produced in the proximity of WNP-2 is far too speculative to confer standing upon the organization. As the Licensing Board observed in rejecting a similar argument in the operating license phase, "[w]e realize that there is a possibility that people residing in Portland may consume produce, meat products, or fish which originate within 50 miles of the site but to allow intervention on this vague basis would make a farce of § 2.714 and the rationale in decisions pertaining to petitions to intervene."[10] Likewise Petitioners' general assertions that certain of its members reside in close proximity to the Columbia River or make occasional visits to the Public Document Room in Richland are - without more - insufficient to establish standing.

Sufficient interest or standing does exist, however, if a Petitioner's residence is located within the close proximity of a power reactor facility.[11]

9/ See, Portland General Electric Co. (Pebble Springs Nuclear Plant, Unit 1 and 2), CLI-76-27, 4 NRC supra at 614.

10/ Washington Public Power Supply System (WPPSS Nuclear Project No. 2), LBP-79-7, 9 NRC supra at 336.

11/ See e.g. Tennessee Valley Authority (Watts Bar Nuclear Generating Station, Unit 1), ALAB-423, 5 NRC supra at 1421, n.4 (1977). Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-125, 6 AEC 371, 372 n.6 (1972); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Unit 1 and 2), ALAB-197, 6 AEC 188(1973); Virginia Electric and Power Company (North Anna Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1976).

Standing may also be conferred based on the close proximity to the facility of a petitioner's "normal, everyday activities"[12/] including recreation.[13/] The River Bend decision states that persons engaged in such activities "within 25 miles of the site can fairly be presumed to have an interest which might be affected by reactor construction and/or operation."[14/]

The affidavit of M. Terry Dana, filed with the pending petition, states that he is a resident of Richland, Washington, is a member of the Coalition and authorizes the organization to represent his interest in this matter. Thus, on its face this affidavit appears to fulfill the interest requirement[15/] and is in itself sufficient to confer standing

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12/ Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-183, 7 AEC 222, 226 (1974).

13/ Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-73-10, 6 AEC 173 (1973).

14/ River Bend, supra at 226 (1974).

15/ See, Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 564-565 (1980) where the Appeal Board addressing standing to intervene in a construction permit extension proceeding determined that persons who, because they reside near the facility site, have the requisite standing to intervene in a construction permit or operating license proceeding, are also possessed of standing to intervene in a construction permit extension proceeding.

on the Coalition based upon the above authority.[16/] This is not to say however, that the concerns expressed by the Permittee regarding the sufficiency of the affidavit of Mr. Dana are without merit or that the Staff opposes the request by the Permittee to probe this matter further. See Answer at 18. Rather, it is simply the Staff's position that judged by the standards traditionally applied by this Agency in its adjudicatory proceedings, the present petition would appear to adequately establish the standing asserted by this organization.

II.

1. In addition to the standing and interest requirements of 10 C.F.R. § 2.714, the regulation calls for petitions to set forth the specific aspect or aspects of the subject-matter of the proceeding as to which a Petitioner wishes to intervene. And the only relevant aspects of the proceeding are those which fall within the scope of the proceeding.[17/]

16/ The affidavit of M. Terry Dana indicates that this Coalition member resides in Richland, Washington. The Environmental Statement, Hanford Number Two Nuclear Power Plant, WPPSS December 1972, states at page I-1, that Richland is located approximately 12 miles from the WNP-2 site.

17/ See, e.g., Metropolitan Edison Company (three Mile Island Nuclear Station, Unit No. 1), Licensing Board "Memorandum and Order Ruling on Petitions and Setting Special Prehearing Conferences" (September 21, 1979)(Restart), slip op. at 6.

In a construction permit extension proceeding the scope is expressly prescribed by 10 C.F.R. § 50.55(b) which provides that a construction permit may be extended for a reasonable period of time for good cause shown.[18/] Section §50.55(b) identifies those types of matters that could provide the basis for an extension. Accordingly, the requisite showing is one of good cause for the delay in construction. However, the specific parameters of the "good cause" showing under 10 C.F.R. § 50.55(b) have been established by the Appeal Board in Indiana and Michigan Electric Co. (Donald C. Cook Nuclear Plant, Units 1 and 2), ALAB-129, 6 AEC 414 (1973) and Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1, ALAB-619, 12 NRC 558 (1980).

Through these two decisions, the Appeal Board has identified the nature of the issues which may be raised in such proceedings, initially in the Cook case and later in the Bailly case. In Cook, the Appeal Board basically identified two types of issues that could be raised in

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18/ 10 C.F.R. § 50.55(b) provides that:

> If the proposed construction or modification of the facility is not completed by the latest completion date, the permit shall expire and all rights thereunder shall be forfeited: Provided, however, That upon good cause shown the Commission will extend the completion date for a reasonable period of time. The Commission will recognize, among other things, developmental problems attributable to the experimental nature of the facility or fire, flood, explosion, strike, sabotage, domestic violence, enemy action, an act of the elements, and other acts beyond the control of the permit holder, as a basis for extending the completion date.

construction permit extension proceedings. Those safety or environmental issues which both (1) arose from the reasons assigned in justification of the request for a construction permit extension; and (2) could not, consistent with the protection of the interests of the intervenors or the public interest, "appropriately abide the event of the environmental review - facility operating license hearing. Id. at 420. In the Bailly case, the Appeal Board pointed out that this standard is to be applied in a common sense fashion based on the totality of the circumstances involved. Id. at 570.

2. In applying this standard to the present petition, the first question which must be addressed in considering the totality of the circumstances involved is that of what significance, if any, should be attached to the fact that in 1978 these petitioners could have, but did not, avail themselves of the opportunity to seek intervention in the operating license phase of this case. Or stated differently, can an individual or organization seek to raise in conjunction with a construction permit extension amendment issues that appropriately should have been addressed in an operating license hearing? We think Bailly and Cook counsel against such a practice.

The second question and possibly the more difficult one is that of the relationship between the specific aspects alleged by the Petitioner

and the factors set forth as "good cause" for the extension.[19/] In its request for a hearing the Petitioner has set forth eight "specific aspects and contentions" which it would seek to litigate in a hearing on the present construction permit extension order.[20/] We have weighed each by the above standard and found them wanting.

19/ The factors stated by permittee which are set forth in the NRC's January 27, 1982 Order as establishing good cause are:

> 1. Changes in the scope of the project including increases in the amount of material and engineering required as a result of regulatory actions, in particular those subject to the TMI-2 accident.
>
> 2. Construction delays and lower than estimated productivity, which resulted in delays in installation of material and equipment and delays in completing of systems necessitating rescheduling of preoperational testing.
>
> 3. Strikes by portions of the construction work force.
>
> 4. Changes in plant design.
>
> 5. Delays in delivery of equipment and materials.

20/ The aspects and contentions asserted by the Petitioner are:

> 1. Delays of 12 months due to WPPSS violations of NRC regulations do not constitute good cause. The Licensee was granted a construction permit on the basis of their ability to construct a safe nuclear plant.
>
> 2. The NRC Staff ignored its own inspection reports and enforcement actions in wrongly concluding that good cause existed in granting the WPPSS request.
>
> 3. The NRC Staff ignored WPPSS's construction history in concluding that "neither the probability nor the consequence of postulated accidents

(Footnote 20 continued on next page.)

In aspect number one, the Petitioner attempts to interject the issue of whether there was a significant cause for delay other than that assigned by the Permitee, specifically, delay caused by the "violations of NRC regulations." Although the Appeal Board in Cook was not called upon to resolve the question of whether other grounds for delay could properly be considered, there is language in that decision which would suggest such was not impermissible. See 6 AEC at 417. However, in the present petition it is unnecessary, we believe, to reach this question in that this specific aspect is otherwise flawed. Here, the overly broad and imprecise nature of this aspect provides insufficient notice as to the matters sought to be litigated and thus on its face renders it unacceptable. Similarly, aspects two and three also suffer from vagueness as well as seeking to raise issues unrelated to the good cause

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20/ (Continuation from previous page.) previously considered will be increased nor will any safety margins associated with this facility be decreased."

4. WPPSS lacks the technical ability to complete and/or operate the facility in a safe manner.

5. Delays in construction have been under full control of WPPSS management.

6. WPPSS lacks the management ability to complete and/or operate the facility in a safe manner.

7. WPPSS lacks the financial ability to complete and/or operate the facility in a safe manner.

8. NRC Staff ignored WPPSS's financial condition in concluding that "neither the probability nor the consequence of postulated accidents previously considered will be increased nor will any safety martins associated with this facility be decreased."

finding. In the main, aspect three is directed toward elements of the no significant hazards consideration finding. However, to the extent they attack the no significant hazards finding, they present no adequate basis for overturning the Director's finding.

In aspects four, six, seven and eight, the petitioner attempts to interject issues of technical, management and financial ability. However, in that the reasons assigned in justification of the request for the construction permit extension do not include such grounds, the guidance of Bailly and Cook precludes their present consideration. Moreover, aspects four, six and seven are allegations of present inadequacies totally unrelated to good cause.[21/] Finally, in aspect five, the petitioner asserts that "[d]elays in construction have been under full control of WPPSS management." This aspect, as worded, relates to one of the grounds asserted by the Permittee in seeking its construction permit extension. However, this aspect does not provide notice as to what matters the petitioner is seeking to litigate if a hearing were to be held, and instead simply states a broad and imprecise conclusion. Without more, this aspect suffers from the same flaw as those discussed previously, and therefore must likewise be rejected on the grounds of vagueness.

3. Thus, having failed to set forth "the specific aspect or aspects of the subject matter of the proceeding as to which [the] petitioner wishes to intervene," it is the Staff's position that, upon consideration

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21/ In Bailly, the Appeal Board suggested, without deciding, that where the issues sought to be raised in a construction permit extension proceeding go beyond the grounds for good cause asserted by the Permittee, Section 2.206 remedies may well be exclusive. 12 NRC at 572-573.

of the totality of the circumstances presented by the present case, the present petition does not comply with the requirements of 10 C.F.R. § 2.714. However, in reaching this conclusion, the Staff fully recognizes that issues of scope and vagueness which we have addressed herein do not lend themselves to precise judgments.

CONCLUSION

For the foregoing reasons, the Staff believes that the Petitioner has demonstrated sufficient standing as required under the existing case law but has not set forth specific aspects to be litigated as required by 10 C.F.R. § 2.714. Accordingly, the present petition - as drafted - should be denied.[22/]

Respectfully submitted,

W. D. Paton

William D. Paton
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 15th day of March, 1982

22/ Because of the conclusion reached herein it is unnecessary, we believe, to address in detail permittee's arguments that: (i) the Commission should require a higher threshold for admission of contentions in this case involving a license amendment for which the Commission has made a "no significant hazards consideration finding' and (ii) the Commission can and should satisfy any requirement for a "hearing" in this case under the Atomic Energy Act and the Due Process Clause of the Constitution through the solicitation of written comments. Answer at 27-29. However, as to the first proposal, we believe that the appropriate forum in which to consider such a change is the Regulation Reform Task Force which is now considering certain proposed changes to the present contention rule. Similarly, we do not perceive a need here to discuss whether the rationale of the Commission's Order in Matter of Kerr-McGee Corp. (West Chicago Rare Earth Facility), CLI-82-2, 14 NRC ____ (1982) can be extended from material licensing to facility licensing.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF ANSWER TO A REQUEST FOR HEARING FILED BY THE COALITION FOR SAFE POWER" 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 though deposit in the Nuclear Regulatory Commission's internal mail system, this 15th day of March, 1982:

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