UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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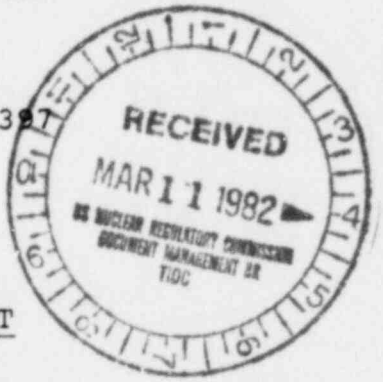
BEFORE THE COMMISSION

In the Matter of

WASHINGTON PUBLIC POWER SUPPLY SYSTEM	)	Docket No. 50-397
(WPPSS Nuclear Project No. 2)	)	



PERMITTEE'S ANSWER IN OPPOSITION TO REQUEST FOR HEARING ON CONSTRUCTION PERMIT AMENDMENT

This matter involves a request for a hearing on an amendment to Construction Permit No. CPPR-93 issued by the Nuclear Regulatory Commission ("NRC") on January 27, 1982. The Washington Public Power Supply System ("Permittee") is the holder of that construction permit, which authorized the construction of Permittee's Nuclear Project No. 2 ("WNP-2").

I. BACKGROUND

An application for a license to operate WNP-2 was filed with the NRC in early 1978. Receipt of that application and notice of opportunity for hearing were published by the NRC on July 26, 1978. 43 Fed. Reg. 32338 (1978). In response to that notice, a petition for leave to intervene was filed on August 28, 1978. That petition sought to raise various health, safety and environmental issues, and opposed issuance of the operating license for WNP-2. After reviewing the pleadings of the parties and conducting a prehearing conference,

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the Atomic Safety and Licensing Board convened to rule on the petition denied the petition. Matter of Washington Public Power Supply System (WPPSS Nuclear Project No. 2), LBP 79-7, 9 NRC 330 (1979). There were no appeals from the Order denying intervention, and on October 9, 1979, the Board terminated the proceeding. ASLB Unpublished Order (October 9, 1979). Accordingly, the application for an operating license is uncontested. Construction of WNP-2 is 8[illegible]% complete. Fuel loading for WNP-2 is scheduled for September 1983.

On September 4, 1981, the Permittee filed a request pursuant to 10 C.F.R. §50.55(b) for an extension of the latest completion date for WNP-2 from December 1, 1981 to February 1, 1984. The factors cited by the Permittee as the cause for delays in completion of construction were (1) changes in project scope due to regulatory actions (primarily improvements as a result of the lessons learned from the TMI-2 incident); (2) construction delays and low productivity; (3) labor strikes; (4) design changes; and (5) delays in delivery of equipment and materials.

On February 2, 1982, the NRC published an "Order Extending Construction Completion Date" for WNP-2. 47 Fed. Reg. 4780 (1982). The Commission stated in the Order that the Permittee had requested an extension of the construction completion date for WNP-2 because construction had been delayed. The Commission recited in the Order the factors

for the construction delay, then concluded that "[t]his action involves no significant hazards consideration; good cause has been shown for the delays; and the requested extension is for a reasonable period . . . ." Id. Accordingly, the Commission extended the latest completion date for WNP-2 from December 1, 1981 to February 1, 1984.

On February 23, 1982, the Coalition for Safe Power ("petitioner") filed a "Request For A Hearing" on the construction permit amendment in which the petitioner recited its purported interests and the alleged effect of the Order on that purported interest. Petitioner also recited the specific aspects and contentions which it seeks to raise. These included broad health and safety issues involving Permittee's technical and financial qualifications to construct and operate WNP-2.

Based upon the following analysis, the Permittee opposes the request for hearing and urges that it be denied.

II. ARGUMENT

A summary of Permittee's argument is (1) that the Atomic Energy Act, as amended, allows the Commission to dispense with a hearing when it concludes that a construction permit amendment involves "no significant hazards consideration," and (2) in the alternative, assuming arguendo that such a hearing is required by the Atomic Energy Act, that petitioner has not demonstrated the requisite "interest" in the amendment

process, how that "interest" may be affected by the amendment, the specific aspects of the amendment as to which petitioner seeks a hearing, and the particularization of the bases for its proposed contentions. Permittee submits that a higher threshold for admission of contentions should be applied by the Commission here (see Part II.B.2.c., infra), and that if a hearing is deemed necessary by the Commission, it should be an informal hearing conducted by the Commission on the basis of written submissions and comments (see Part II.C., infra).

A. NRC May Dispense With Hearing On CP Amendment

Permittee submits that an opportunity for hearing does not exist under Section 189(a) of the Atomic Energy Act, as amended, 42 U.S.C. §2239, if the Commission determines (as it did for the WNP-2 amendment) that the license amendment involves "no significant hazards consideration." The only court to address the issue is the United States Court of Appeals for the District of Columbia Circuit, and even that Court has not been consistent in its interpretations. Compare Union of Concerned Scientists v. Atomic Energy Commission, 499 F.2d 1069, 1084, n. 36 (D.C. Cir. 1974) and Brooks v. Atomic Energy Commission, 476 F.2d 924 (D.C. Cir. 1973) with Sholly v. Nuclear Regulatory Commission, 651 F.2d 780 (D.C. Cir. 1980), rehearing denied, 651 F.2d 792, cert. granted, 49 U.S.L.W. 3877 (May 26, 1981).

The focal point of the issue is the interpretation of the fourth (and last) sentence of Section 189(a) which reads as follows:

> The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

The most reasonable interpretation of that sentence, read in the context of all of Section 189, is that the Commission may dispense with a hearing when it makes the "no significant hazards consideration" finding. Any other interpretation would render ludicrous results. Surely Congress did not intend that every amendment to a construction permit and operating license that NRC issues would be subject to a hearing. NRC issues hundreds of such amendments yearly, and hundreds are pending before the agency at any time. Hearings on each would tax the agency's resources beyond their limit yet would result in no meaningful enhancement of public health and safety.

Only where NRC is unable or unwilling to make the "no significant hazards consideration" finding is and should a hearing be available. In that circumstance, the agency obviously considers there to be important safety questions involved in the amendment, and the opportunity for hearing is afforded. See 10 C.F.R. §2.105(a)(3).

Nothing in the case law compels a different conclusion. In Brooks, supra, the Court was faced with a situation where the Atomic Energy Commission ("AEC") had amended construction permits (extending latest completion dates) without any finding on significant hazards considerations, yet had not issued prior notice and opportunity for hearing. The Court found on the basis of the facts in Brooks that the petitioners there had made a formal request for a hearing on the amendment before the amendment was issued. It then found, on the basis of that prior request for hearing and the lack of a significant hazards consideration finding, that Section 189 requires the Commission to afford "an opportunity for hearing before extending the completion dates of the construction permits." Brooks, supra, 476 F.2d at 927. This interpretation of Section 189 comports with that set forth above by Permittee.

In Union of Concerned Scientists, supra, the Court on petition for review affirmed the actions of the AEC in issuing an operating license for a power reactor. In its discussion of whether derating of the reactor could result at a later time, the Court noted that the amendment to derate the reactor could cause a hearing to be held. It noted that the determining factor would be whether the "no significant hazards" finding was made, as follows:

> An amendment can be made without opportunity for a hearing if the AEC determines that it "involves no

> significant hazards consideration." 42 U.S.C. §2239(a). [499 F.2d at 1084, n. 36.]

Again, this is consistent with Permittee's interpretation of Section 189. Indeed, we view Brooks and Union of Concerned Scientists as being generally compatible, a result not surprising given that Judge Bazelon sat on both cases.

The Court in Sholly v. Nuclear Regulatory Commission, supra, faced with a unique set of facts, held that NRC must afford an opportunity for hearing pursuant to Section 189, notwithstanding a finding of "no significant hazards consideration." This result is inconsistent with Union of Concerned Scientists and the legislative history Section 189. In our view, the Court also misconstrued the reach of Brooks by failing to view the result there as a function of the facts, as discussed above. 1/

1/ In the Court's Statement on Denial of Rehearing En Banc, four Judges on the Court analyzed the opinion in Sholly, as follows:

> We believe that the panel unjustifiably relied on this court's brief per curiam opinion in Brooks to support its central proposition. We further believe that the panel's independent interpretation of the relevant language in section 189(a) ignored logic and distorted the legislative history of that section. [651 F.2d at 795].

It is interesting to note that Judge MacKinnon was a member of the panel in Brooks and also participated in the Statement quoted here.

In any event, the NRC is not bound by Sholly because issuance of mandate was stayed by the D.C. Circuit on April 9, 1980. 2/ In the absence of the mandate, the NRC is free to and should interpret Section 189 as allowing it to dispense with a hearing when it concludes that a license amendment involves "no significant hazards consideration." 3/

Given this interpretation of Section 189, petitioner nevertheless is not without recourse or remedy. While it cannot request a hearing directly (as it has here), it may file a request, pursuant to 10 C.F.R. §2.206, that NRC initiate a show cause proceeding on any issue leading to license modification, suspension or revocation. This procedure is available during both construction and operation of a power reactor. Further, judicial review of NRC action on such a request is available in the courts. 42 U.S.C. §2239(b), 28 U.S.C. §2342; see Honicker v. Hendrie, 465 F. Supp. 414, 418 (M.D. Tenn. 1979).

2/ The Supreme Court issued a writ of certiorari in Nuclear Regulatory Commission v. Sholly, 49 U.S.L.W. 3877 (May 26, 1981). In addition, legislation has been proposed in Congress which may negate the Sholly decision and clarify NRC authority in this area. See H.R. 2330 (§7) and S. 1207 (§202).

3/ Cf. City of Cleveland, Ohio v. Federal Power Commission 561 F.2d 344, 346-47 (D.C. Cir. 1977).

B. Petitioner Has Not Supported Hearing Request With Appropriate Showings

Assuming arguendo that an opportunity for hearing on the construction permit amendment is prescribed by the Atomic Energy Act, the request for hearing should be denied by the Commission itself (without reference to an Atomic Safety and Licensing Board). Petitioner has not demonstrated clear legal "interest" in the amendment process, how that "interest" may be affected by the amendment, the specific aspects of the amendment as to which petitioner seeks a hearing, and the particularization of the bases for its proposed contentions.

Before addressing this issue in detail, we wish to urge the Commission in ruling on the request for hearing to consider carefully the rationale of the Appeal Board in Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Power Station), ALAB-305, 3 NRC 8 (1976). 4/ While the Zimmmer case involved an operating license application and not an amendment to a construction permit as here, the Appeal Board's views are equally applicable here because both OL and CP amendment proceedings involve permissive hearings, not mandatory hearings.

The Appeal Board observed in Zimmer that "[i]n an operating license proceeding, unlike a construction permit

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4/ Accord, Gulf States Utilities Co. (River Bend Station Units 1 and 2), ALAB-183, 7 AEC 222, 226, n. 10 (1974).

proceeding, a hearing is not mandatory," and cautioned that "before granting an intervention petition and thus triggering [an OL] hearing, a licensing board should take the utmost care to satisfy itself fully that there is at least one contention advanced in the petition which, on its face, raises an issue clearly open to adjudication in the proceeding." The Appeal Board further cautioned that "a board should take equal care in [OL] cases to assure itself that potential intervenors do have a real stake [i.e., interest] in the proceeding." 3 NRC at 12.

Likewise, the Commission should take the utmost care to assure that a hearing on the WNP-2 amendment is convened only if clear legal interest is demonstrated and a valid contention clearly open to adjudication is specified. In this latter regard, Permittee urges below (see Part II.B.2.c., infra) that the Commission adopt special procedures in lieu of 10 C.F.R. §2.714(b) for use in this case to require an initial affirmative showing by petitioner that proposed contentions have merit.

1. Petitioner Has Not Demonstrated Clear Legal Interest In The Proceeding

The teachings of the Commission in Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976), and the Appeal Board's

decisions 5/ in the wake of Pebble Springs, establish the test for determining whether an individual may be permitted to intervene as a matter of right in a proceeding involving issuance of a construction permit or operating license. Such an intervenor must assert an "interest which may be affected" by the proceeding. Applying contemporaneous judicial concepts of standing, 6/ the Commission in Pebble Springs interpreted this "interest" requirement as requiring the allegation of both (1) some injury in fact that has occurred or will probably result from the action involved, and (2) an interest "arguably within the zone of interests" to be protected or regulated by the statute sought to be invoked. The Appeal Board has recognized that these tests apply as well in proceedings involving construction permit amendments. Northern Indiana Public Service Co. (Bailly Operating Station, Nuclear 1), ALAB-619, 12 NRC 558, 564-65 (1980).

5/ E.g., Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit No. 2), ALAB-470, 7 NRC 473 (1978); Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418 (1977); Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-397, 5 NRC 1143 (1977).

6/ Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 439 (1980); see Warth v. Seldin, 422 U.S. 490 (1975); Sierra Club v. Morton, 405 U.S. 727 (1972); Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970).

It is well established that for an organization to intervene as the representative of its members, the organization must establish that at least one of its members has standing on his own right. E.g., Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-322, 3 NRC 328 (1978); see Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 40 (1976); Warth v. Seldin, 422 U.S. 490 (1975). The specific members must be identified, how their interests may be affected must be shown, and the members' authorization to the organization to intervene must be established. Edlow International Company, CLI-76-6, 3 NRC 563 (1976). Allied General Nuclear Service (Barnwell Fuel and Recovery Station), LPB-76-12, 3 NRC 277 (1976), aff'd, ALAB-328, 3 NRC 420 (1976). Following this mandate, the cases are clear that the individual member from whom organizational standing is derived must, in some manner (e.g., affidavit), state his concerns and interest in detail sufficient to establish individual standing. 7/ Thus, the question of petitioner's standing must be resolved on the demonstration of interest

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7/ Allied General Nuclear Services (Barnwell Fuel Receiving and Storage Station) LBP-76-12, 3 NRC 277, 286 (1976), aff'd, ALAB-328, 3 NRC 420, 423 (1976); Duke Power Company (Catawba Nuclear Station, Units 1 and 2) LBP-73-28, 6 AEC 666, 680 (1973), aff'd, ALAB-150, 6 AEC 811 (1973); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1) LBP-77-11, 5 NRC 481, 482-483 (1977).

by the individuals whom the petitioner asserts are its members.

Viewed against this legal framework, it is not clear on the basis of the pleading filed by petitioner that appropriate "injury in fact" has been alleged or that petitioner falls within the "zone of interests" of the Atomic Energy Act or the National Environmental Policy Act. Petitioner attempts to base its "interests" on the fact that (1) its members are ratepayers who are subject to payment for WNP-2 through the Bonneville Power Administration ("BPA"); (2) they are located "within close proximity to the Columbia River;" (3) they live, work, travel and recreate in close proximity to the WNP-2 site; and (4) they eat foodstuffs grown and produced in the area potentially impacted by operation of WNP-2. Beyond these vague assertions, petitioner's alleged "interest" in this proceeding is based exclusively on two people. Petitioner alleges that the first resides in Yakima, Washington, approximately 65 miles from the WNP-2 site, and the second resides in the vicinity of Richland, Washington, approximately 20 miles from the WNP-2 site (Affidavits of William E. Rupel and M. Terry Dana, attached to petitioner's Request For A Hearing).

The law is clear that economic personal interest as a ratepayer does not confirm standing to intervene as a matter of right. The Commission itself ruled on this

point in Pebble Springs, supra, concluding that the economic interest of a ratepayer does not come within the "zone of interests" protected by the Atomic Energy Act. 4 NRC at 614.

The Appeal Board further clarified this point in Fermi, supra, when it concluded that "neither the Atomic Energy Act nor the National Environmental Policy Act embraces within its 'zone of interests' economic concerns even remotely akin to those which [the intervenor] would press as a member and ratepayer of a cooperative that purchases power from a proposed Fermi co-owner." 7 NRC at 475. 8/ The law on this point is so well established that little purpose would be served by additional discussion of the legion of cases. 9/ Suffice it to say that any attempt by Petitioner to establish its "interest" by virtue of the fact that its members are ratepayers of BPA must fail.

8/ Petitioner's members are not ratepayers of the Permittee, but of the Bonneville Power Administration (directly or indirectly). Accordingly, petitioner is even further removed from the Permittee than the intervenors were in Fermi. However, this is a factual distinction with little (if any) legal significance. The law is clear that even a direct customer of an applicant is not, based upon that fact alone, vested with the requisite interest to intervene. Pebble Springs, supra.

9/ E.g., Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station), ALAB-582, 11 NRC 239, 243, n. 8 (1980); Watts Bar, supra, 5 NRC 1418 (1977); Black Fox, supra, 5 NRC 1143 (1977).

Further, vague assertions that petitioner's members live near the Columbia River (a river 1270 miles long), live and recreate near the WNP-2 site, or eat foodstuffs grown in areas near the WNP-2 site are too remote and lacking in specificity to provide legal interest necessary to support a request for hearing. Recreational activities in an area may provide the requisite interest only if the area is in close proximity to a plant site and the recreational activities are stated with specificity and are substantial in nature. Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-397, 5 NRC 1143, 1150 (1977); Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 425 (1973). Evaluating the request for hearing against this guidance, it is clear that petitioner has failed to allege specific facts which demonstrate substantial recreational use of the area around the site. Vague and general assertions relating to living and recreating in the vicinity of the WNP-2 site are precisely the types of claims which both the Appeal Board and the Commission have recognized are insufficient to establish standing.

Petitioner's other general assertion that its members consume food grown or produced in areas that would be impacted by plant operations is too speculative and lacking in specificity to establish legal interest to support the

request for hearing. To confer standing on a petitioner residing outside the relevant geographical zone based on an assertion that some food consumed by the petitioner (or its members) may have been grown near the site would emasculate judicial concepts of standing as well as the interest requirements of the Atomic Energy Act and the Commission's Rules of Practice. The logical extension of such a proposition would be that an individual living in Washington, D.C. who consumed California oranges could be awarded standing in a proceeding relating to a nuclear facility in California. Certainly Congress did not intend and has not sanctioned such an interpretation of the Atomic Energy Act, and the Commission and the courts certainly have not judicially construed the Act in such a manner.

The sole remaining bases upon which the petitioner could even arguably establish "interest" is the claimed membership in it of two identified individuals. However, based upon its pleading, petitioner has not necessarily established requisite interest to support its request for hearing based upon the places of residence of these individuals. One of them (William E. Rupel) resides in Yakima, Washington (approximately 65 miles west of the WNP-2 site). This is clearly outside the geographical zone which might be affected by routine or accidental releases of fission products from

WNP-2, 10/ and beyond the distance recognized by the NRC in the past to be sufficiently close to vest an interest (if otherwise well plead) in the proceeding. 11/ In short, the petitioner is not vested on the basis of residential location of its member Rupel. As to this member and other members of petitioner who reside at such distances from the WNP-2 site, "prima facie, there would appear to be no reasonable chance of [their] being at all adversely affected by either normal operations or a credible accident." River Bend, supra, 7 AEC at 226.

The other purported member of petitioner (M. Terry Dana) allegedly resides in Richland, Washington (described by petitioner as 20 miles from the WNP-2 site). The affidavit of that individual is a "form-letter" type of affidavit containing four blanks to be filled in by the affiant (i.e., the affiant's name, street and city address, and county of residence). The affidavit does not otherwise express any purported "interest" in this proceeding. The affidavit merely includes a "boilerplate" statement that the affiant

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10/ Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-125, 6 AEC 371, 37

11/ E.g., Portland General Electric Co. (Trojan Nuclear Plant), ALAB-496, 8 AEC 308 (1978) (40 miles); River Bend, supra, 7 AEC 222 (1974 (25 miles); Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-146, 6 AEC 631 (1973) (16 miles); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188 (1973) (40 miles).

authorizes this petitioner "to represent my interests before the Nuclear Regulatory Commission on any matter pertaining to nuclear units 1, 2 or 4 of the Washington Public Power Supply System . . . ." Affidavit of M. Terry Dana. In view of the "boilerplate" nature of this affidavit, it is not at all clear that the affiant foresaw and authorized the use of the affidavit as the sole valid support for this request for hearing, or that the affiant read or even knows of the request for hearing. In any event, it is clear that the affiant has not stated the specific aspect of the matter as to which he/she requests a hearing.

In any event, the only possible "interest" of petitioner derives from this lone individual allegedly residing in Richland. The Dana affidavit is the fulcrum for petitioner's request for hearing, for without it no interest can be established and no hearing can be convened. In these circumstances, fundamental fairness to the Permittee and sound regulatory policy and practice dictate that the Commission allow the Permittee (and the Staff, if it wishes) to probe the circumstances surrounding the execution of the Dana affidavit. Mindful of its rationale in Zimmer, supra, and in view of the pivotal and broad (yet vague) nature of the Dana affidavit, the Commission should satisfy itself that the affiant understands the import and consequences of his/her action, fully intends that the affidavit be used as

the sole basis for convening a costly and time-consuming hearing that otherwise would not be required, and in fact resides at the address stated in the affidavit. Such threshold inquiry is appropriate here before the Commission reaches the question of interest, and the Commission certainly has the authority to conduct or permit the inquiry. See Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978).

2. Petitioner Has Neither Demonstrated How Interest May Be Affected And Aspects Sought To Be Litigated, Nor Specified Valid Contention

a. Permissible Scope of CP Amendment Proceeding

In order to set the proper framework for an evaluation of how a possible interest may be affected and the aspects sought to be litigated, it is appropriate first to discuss the permissible scope of a construction permit amendment proceeding. Section 185 of the Atomic Energy Act, as amended, 42 U.S.C. §2235, provides that a construction permit issued for a nuclear power reactor shall state the earliest and latest dates for the completion of the facility. That section also provides that unless construction is completed by the latest completion date, the construction permit shall expire unless the Commission extends the completion date "upon good cause shown."

Section 185 is implemented in 10 C.F.R. §50.55(a) and (b). That regulation repeats the legal test set forth

in Section 185, noting that the Commission will extend the completion date "upon good cause shown." It provides that the Commission will recognize, "among other things," causes such as fire, flood, strike, sabotage, an act of the elements, "and other acts beyond the control of the permit holder" as bases for extending the completion date. 10 C.F.R. §50.55(b). However, the list in 10 C.F.R. §50.55(b) is not exclusive. See Indiana and Michigan Electric Company (Donald C. Cook Nuclear Plant, Units 1 and 2), ALAB-129, 6 AEC 414, 419 (1973).

The guiding cases on the proper scope of a "good cause" inquiry under Section 185 of the Act and 10 C.F.R. §50.55(b) are Bailly, supra, ALAB-619, 12 NRC 558 (1980) and Cook, supra, ALAB-129, 6 AEC 414 (1973). The principles of Cook are (1) that whether "good cause" exists is dependent upon the facts of each case, and (2) that the factors for the adjudicator to consider in testing a "good cause" determination should be based upon "the totality of the circumstances" in the case. Another principle important here is that "[t]he fundamental purpose of that hearing is, after all, not to determine the safety or environmental aspects of the reactor in question." Cook, supra, 6 AEC at 420.

The Appeal Board in Cook concluded, at bottom, that the scope of the "good cause" inquiry in that construction permit amendment was properly limited to the reasons assigned

by the Permittee in the extension request for the delays in construction. The Appeal Board expressly held that safety and environmental issues were to be considered in operating license hearings. Cook, supra, 6 AEC at 422. 12/

In Bailly, the Appeal Board further clarified the issue. It noted that the legal question in a construction permit amendment proceeding is whether "good cause" exists for the determination made by NRC. It also noted that each issue to be litigated should be directly tied to the reasons why construction could not be completed on schedule. The Appeal Board then concluded that the issue sought to be raised in the Bailly permit extension proceeding (i.e., site suitability) was not appropriate. It confirmed that "a permit extension proceeding is not convened for the purpose of conducting an open-ended inquiry into the safety and environmental aspects of reactor construction and operation." Bailly, supra, 12 NRC at 573.

12/ Petitioner did not avail itself of the opportunity for a hearing on the operating license application for WNP-2. Supra, pp. 1-2. Nevertheless, an operating license hearing is not the only viable forum in which the petitioner could ventilate its concerns. Any member of the public may request that NRC, pursuant to 10 C.F.R. §2.206, initiate a show cause proceeding on any issue. This procedure is available during both construction and operation of a power reactor. Further, where, as here, the issues sought to be raised have no discernible relationship to the pending construction permit amendment proceeding, the remedy in 10 C.F.R. §2.206 is exclusive. Bailly, supra, 12 NRC at 570.

It is obvious from the general tone and breadth of petitioner's request for hearing that it fails to comprehend the limited permissible scope of a construction permit amendment proceeding. If a hearing is held, general issues of plant construction and operation are not entertainable. An amendment proceeding is not a substitute for an operating license hearing, and petitioner's bootstrap attempt to resurrect the opportunity for such a broad hearing should not be sanctioned by the Commission.

b. How Interest may be Affected; Specific Aspects as to Which Hearing Sought

It is clear that Section 189 "does not confer the automatic right of intervention on anyone." BPI v. Atomic Energy Commission, 502 F.2d 424, 428 (D.C. Cir. 1974). The Commission Rules of Practice set forth the requirements to be met by any person seeking to participate in a hearing. 10 C.F.R. §2.714(a). 13/ The Rules require that the petitioner seeking intervenor status set forth (1) the interest of the petitioner in the proceeding; (2) how that interest may be affected by the results of the proceeding; and (3) the specific aspect of the subject matter of the

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13/ While these Rules by their terms do not expressly apply to construction permit amendment proceedings for which a "no significant hazards consideration" finding is made (see Part II.B.2.c.), Permittee believes that the "interest" aspect of 10 C.F.R. §2.714(a) is applied appropriately here.

proceeding as to which petitioner wishes to intervene. 10 C.F.R. §2.714(a)(2). The discussion in Part II.B.1., supra, addresses the question of petitioner's interest. We now address the questions of how that interest may be affected and the specific aspects of the subject matter which petitioner seeks to litigate.

The result of the construction permit amendment is that construction of WNP-2 may continue for a maximum of 26 months beyond the prior completion date. 14/ It does not change the design or the projected cost or commercial operation date. The amendment does not relate to the broader issues of overall plant construction and operation. Those are issues which are appropriate for consideration in an operating license hearing or a show cause proceeding initiated pursuant to 10 C.F.R. §2.206. To allow consideration of such broad issues in this limited matter would flaunt and allow opponents to circumvent the two-step licensing process contemplated by the Atomic Energy Act and sanctioned by the Supreme Court in PRDC v. International Union, 367 U.S. 396 (1961). In addition, it would also encourage dilatory conduct on the part of those seeking to delay or halt operation of a nuclear plant by allowing them to litigate or relitigate

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14/ In all likelihood, construction will continue for approximately 18 months. As noted, completion of construction and fuel loading for WNP-2 are scheduled for September 1983.

operating license issues when a deadline extension request is filed (as now seems inevitable in every case).

Petitioner has not demonstrated how its interests may be affected by the extension of the construction permit completion date. It must not be permitted to do so by merely alleging that one of its members lives in the vicinity of the plant. While that showing may demonstrate an "interest" in the proceeding, it does not per se demonstrate how that "interest" may be affected by the results of the proceeding. Much more should be required, particularly in a case where, as here, no hearing is necessary unless this threshold is satisfied. Zimmer, supra. Petitioner has not fulfilled this requirement, and its request for hearing should be denied for this reason alone.

The requirement that petitioner demonstrate the aspect of the subject matter as to which it requests a hearing compels petitioner to show that the issues it seeks to raise are within the scope of the permit amendment and litigable in that context. If the statement describing the aspect contains only subject matter outside of the scope of the amendment, the request for hearing must be denied.

This requirement is no formality or meaningless recitation of words. It is substantive and meaningful, and often leads to denials of requests to intervene. As the Appeal Board observed in Bailly, supra, 12 NRC at 565:

> Whether a petitioner for intervention has cognizable interest in the outcome of a proceeding and whether a particular issue is litigable in that proceeding are quite discrete questions which often will require different answers.

Petitioner apparently attempts to identify the specific aspect of the subject matter as to which petitioner seeks a hearing in the section of its request for hearing titled "Specific Aspects and Contentions." It apparently attempts to fulfill this requirement by reciting several short, unsupported conclusions. This attempt is inadequate, and petitioner again has failed to meet the requirements of the Rules. The vague conclusions set forth by petitioners are not sufficiently particularized to allow the Commission to determine whether in fact petitioner seeks to litigate an aspect which is within the permissible limited scope of the proceeding. Rather, petitioner's request on its face indicates that petitioner seeks to participate in a full-scale hearing involving broad issues of plant construction and operation. The teachings of Cook, supra, and Bailly, supra, are clear that a permit amendment proceeding is not the proper forum to determine the safety and environmental aspects of power reactors. See Cook, supra, 6 AEC at 420. Accordingly, the request for hearing should be denied.

c. Contentions and Bases Therefor

The Commission's Rules of General Applicability (10 C.F.R. Part 2, Subpart G) provide general guidance for the

handling of petitions to intervene in hearings that are noticed as mandatory or as available upon request. These Rules govern all adjudications initiated by show cause orders, civil penalty actions, a general notice of hearing, a notice of proposed action under 10 C.F.R. §2.105 (such as, for example, a license amendment that involves a significant hazards consideration), and an antitrust hearing. 10 C.F.R. §2.700. Those Rules do not by their terms expressly apply to requests for hearing on a construction permit amendment for which a "no significant hazards consideration" finding is made. See Matter of Kerr-McGee Corp. (West Chicago Rare Earth Facility), CLI-82-2, 14 NRC ___, slip op. at 19-21 (February 11, 1982).

In view of the unusual nature of the instant request for hearing, the narrow permissible scope of any hearing (see Part II.B.2.a.), and the policy implications of the Commission's handling of the request, Permittee submits that special procedures should be established by the Commission to handle this matter. The resources of the NRC trial staff and licensing boards are already over-taxed. It would be untoward for the Commission to send the instant request for hearing to a licensing board for consideration if not absolutely necessary. Rarely will matters at issue in a license amendment proceeding "justify the time-consuming, expensive business of preparing testimony and finding an

opportunity to fit its presentation into a schedule of a busy [licensing board]." Matter of Kerr-McGee Corp., supra, slip op. at 25-26.

In these circumstances, the Commission is free to fashion appropriate procedures for handling requests for hearing such as the one here. 15/ For example, it should require that petitioner state its contentions now when it requests a hearing, not later as is provided in the Rules (10 C.F.R. §2.714(b)). Prior to 1978, the Commission's Rules provided that such initial requests should include both interest and contentions (see 43 Fed. Reg. 17798 (April 26, 1978)), and that provision was found upon judicial review to be consistent with Section 189. BPI v. Atomic Energy Commission, supra.

In addition, 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. As noted, it is not unreasonable for the Commission to require the proponent of a hearing to specify at the outset the basis for the hearing request and the issues to be heard. The Court in

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15/ Of course, there may be legal constraints on Commission flexibility in this regard. For example, the legal standards for finding interest to intervene or request a hearing seem well-established. See Part II.B.1., supra.

BPI v. Atomic Energy Commission, supra, 502 F.2d at 429, observed as follows:

> Section 189(a) does not necessarily preclude a regulation that the application [for a hearing] give content to the subject matter of the hearing sought.

Because the Commission has found that no important public health and safety issues are implicated in the instant license amendment, the Commission should require the petitioner to demonstrate, prima facie, that there are genuine and substantial issues of material fact that are relevant to the narrow legal question of whether good cause existed for the extension of the completion date in the permit. See Section 185 of the Atomic Energy Act, 42 U.S.C. §2235. Permittee and the Staff should be afforded the opportunity to respond. Questions of law should be decided by the Commission summarily.

A similar requirement is imposed upon proponents of hearings in other federal administrative agencies, 16/ and has been affirmed by the Supreme Court as an appropriate threshold burden to be placed upon the proponent who has a statutory opportunity for hearing. Costle v. Pacific Legal Foundation, 445 U.S. 198, 214 (1980); Weinberger v. Hynson,

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16/ E.g., Environmental Protection Agency (40 C.F.R. §125.36(c)(1)(ii)); Food and Drug Administration (21 C.F.R. §130.14(b)). [N.B. These citations to the Code of Federal Regulations were current when the Supreme Court decided the Costle and Weinberger cases cited in the text.]

Westcott & Dunning, 412 U.S. 609, 620 (1973); see Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978). Further, there is nothing in Section 189 or elsewhere in the Atomic Energy Act that precludes the Commission from imposing such a requirement on this petitioner.

C. Any Hearing Should Be Informal, Non-Adjudicatory

Assuming that the threshold burden on contentions is sustained by petitioner, the Commission should determine the scope of any inquiry it deems necessary and appropriate, then call for detailed written submissions and comments from petitioner, with responses from Permittee and the Staff to follow. 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. Matter of Kerr-McGee, supra. 17/

The Commission recently issued an exhaustive opinion on point in Kerr-McGee, supra, a case involving a request for hearing on an amendment to a materials license. We see no need to rehearse the important holdings of Kerr-McGee at

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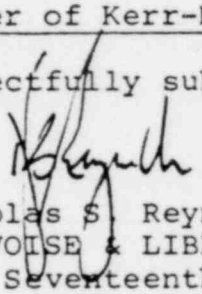
17/ Because this would be the first time that the Commission applied the rationale in Kerr-McGee to power reactor amendment cases, Permittee believes that the Commission itself should receive the written submissions and comments (as it did in Kerr-McGee) rather than appoint a licensing board.

a hearing when it concludes that a construction permit amendment involves "no significant hazards consideration." In the alternative, Permittee submits that petitioner has failed to make the necessary showings (interest, how affected, and aspects involved) to support its request for hearing, and has not specified a valid contention.

Permittee urges the Commission to raise the threshold for admission of proposed contentions in this "no hazards" amendment proceeding by requiring a prima facie showing that there are genuine and substantial issues of material fact that are relevant to the narrow legal question of whether good cause existed for the extension of the completion date in the permit. Permittee also urges the Commission to conduct any hearing deemed necessary by receipt of written submissions and comments from the parties, rather than a formal, trial-type hearing. Matter of Kerr-McGee, supra.

Respectfully submitted,



Nicholas S. Reynolds
DEBEVOISE & LIBERMAN
1200 Seventeenth Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 857-9817

Counsel for Washington Public
Power Supply System

Date: March 10, 1982

length here, for we assume that they are fresh on the mind of the Commission (having been issued one month ago). 18/ Suffice it to say that the Commission concluded there that (1) Section 189 of the Atomic Energy Act does not require that all hearings be conducted as formal, trial-type proceedings under Section 554 of the Administrative Procedure Act, 5 U.S.C. §554; (2) the Due Process Clause does not require that all hearings be conducted as formal, trial-type proceedings; and (3) Section 189 and the Due Process Clause allow the Commission to conduct an informal hearing in some licensing cases.

The case at bar, a power reactor amendment case where a "no significant hazards consideration" finding was made, is an appropriate place for the application of Kerr-McGee. Such an approach would be consistent with law, prudent as a matter of policy and resource allocation, and justified from public health and safety standpoints.

III. CONCLUSION

In sum, Permittee submits that Section 189 of the Atomic Energy Act allows the Commission to dispense with

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18/ We of course would welcome the opportunity to brief the Commission further on the applicability of Kerr-McGee and the policy implications of that decision to the case at bar. As discussed above, we believe that the rationale of Kerr-McGee is fully applicable and should be applied here.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Permittee's Answer In Opposition To Request For Hearing On Construction Permit Amendment," in the above-captioned matter were served upon the following persons by deposit in the United States mail, first class postage prepaid this 10th day of March 1982:

The Honorable Nunzio J. Palladino
Chairman
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Commissioner Victor Gilinsky
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Commissioner John J. Ahearne
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Commissioner Peter A. Bradford
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Commissioner Thomas D. Roberts
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

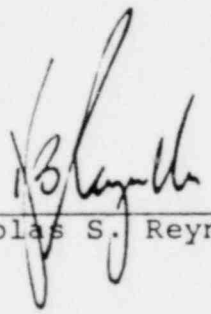
Mr. Samuel J. Chilk
Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Leonard Bickwit, Jr., Esq.
General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Guy H. Cunningham, Esq.
Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

William D. Paton, Esq.
Office of the Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Eugene Rosolie
Coalition for Safe Power
Suite 527
408 South West 2nd
Portland, Oregon 97204



Nicholas S. Reynolds