

J. Hunt
DS07

8/30/82

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)

WISCONSIN ELECTRIC POWER COMPANY)

(Point Beach Nuclear Plant,
Units 1 and 2))

Docket No. 50-266-OLA2

RESPONSE OF THE NRC STAFF TO PETITION
FOR LEAVE TO INTERVENE FILED BY DECADE

I. INTRODUCTION

On July 12, 1982, the Nuclear Regulatory Commission published in the Federal Register (47 Fed. Reg. 30125) a "Proposed Issuance of Amendment to Facility Operating License" which directed that petitions for leave to intervene in the above proceeding must be filed on or before August 11, 1982.^{1/} On August 10, 1982 a "Petition for Leave to Intervene and Petition for Hearing" (Petition) was filed by Peter Anderson on behalf of Petitioner Wisconsin's Environmental Decade, Inc. (Decade).^{2/} For the reasons discussed below, Decade has not met the "interest" requirements of 10 C.F.R.

^{1/} The Staff acknowledges that Petitioner Decade is currently participating as an intervenor in another proceeding involving the same facility. However, this particular licensing action is a separate proceeding and Decade must independently demonstrate its interest and standing to participate as an intervenor. See Memorandum (Concerning Docket Number) dated August 20, 1982.

^{2/} On August 18, 1982, the Commission established this Atomic Safety and Licensing Board (Board) to rule on petitions for leave to intervene and/or requests for hearing and to preside over the proceeding in the event that a hearing is ordered. 47 Fed. Reg. 37010, 11 (August 24, 1982).

§ 2.714 and applicable case law and its petition must be denied at this time.^{3/}

II. ARGUMENT

A. Requirements for Intervention

1. Petitioners Must Meet the "Interest" Requirements of 10 C.F.R. § 2.714

As stated in the Federal Register Notice (47 Fed. Reg. 30125) the Commission's regulations require that a petitioner for leave to intervene submit a written petition setting forth with particularity the petitioner's interest in the proceeding, how that interest may be affected by the results of the proceeding, including the reasons why the petitioner should be permitted to intervene. 10 C.F.R. § 2.714(a)(2). This section also requires the petition to make particular reference to the factors in 10 C.F.R. § 2.714(d) which are as follows:

- 1) The nature of the Petitioner's interest under the Atomic Energy Act,
- 2) The nature of his property, financial or other interest in the proceeding, and
- 3) The possible effect of an order in this proceeding on Petitioner's interest.

In determining whether the foregoing requirements have been satisfied, the Commission has ruled that contemporaneous judicial concepts of

^{3/} As noted in the Federal Register notice (47 Fed. Reg. 30125) the Commission's Rules of Practice provide that any person who has filed a petition for leave to intervene may amend his petition without prior approval of the presiding officer at any time up to fifteen (15) days prior to the holding of the special prehearing conference pursuant to 10 C.F.R. § 2.751a. 10 C.F.R. § 2.714(a)(3). Thus, while the instant petition fails to comply with the Commission's regulation, it may be possible for the defects noted in this response to be cured by a supplemental filing of the Petitioner.

standing should be applied in NRC licensing proceedings. Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-27, 4 NRC 610, 613-14 (1976). These concepts require a showing that the action being challenged could cause injury in fact^{4/} to the person seeking standing, and that such injury is arguably within the "zone of interest," protected by the Atomic Energy Act or the National Environmental Policy Act. Id. See also, Warth v. Seldin, 422 U.S. 490 (1975); Sierra Club v. Morton, 405 U.S. 727 (1972); Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 153 (1970).

The Commission and Appeal Board have ruled that a ratepayer's interest is not within the "zone of interests" to be protected or regulated by either the Atomic Energy Act or the National Environmental Policy Act. See Pebble Springs, CLI-76-27, supra at 614; Kansas Gas and Electric Co. et al. (Wolf Creek Generating Station, Unit No. 1), ALAB-424, 6 NRC 122, 128 (1977).

The Appeal Board has held that the geographical proximity of petitioner's residence to the facility standing alone is sufficient to satisfy the interest requirements of 10 C.F.R. § 2.714, although it was noted that the petitioner had asserted a causal relationship between the proposed action and petitioner's well-being. Virginia Electric and

^{4/} "Abstract concerns" or a "mere academic interest" in the matter which are not accompanied by some real impact on a petitioner will not confer standing. In the Matter of Ten Applications for Low-Enriched Uranium Exports to EURATOM Member Nations, CLI-77-24, 6 NRC 525, 531 (1977); Pebble Springs, CLI-76-27, supra at 613. Rather the asserted harm must have some particular effect on petitioner, Ten Applications, CLI-77-24, supra, and a petitioner must have some direct stake in the outcome of the proceeding. See Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420, 422 (1976).

Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979) (citing, Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-183, 7 AEC 222, 223-24 (1974)). Though no firm outer boundary for this geographic "zone of interest" has been determined, distances of up to 50 miles have been accepted by the Appeal Board as conferring standing upon particular petitioners. See, e.g., Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 n. 4 (1977). Cf. Virginia Electric & Power Co. (North Anna Power Station, Units 1 and 2), ALAB-146, 6 AEC 631, 633-34 (1973); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 190, 193, aff'd, CLI-73-12, 6 AEC 241 (1973), reconsid. den. ALAB-110, 6 AEC 247.

An organization may gain standing to intervene based on injury to itself. Ten Applications, CLI-77-24, supra at 531. If the organization seeks standing on its own behalf, it must establish that it will be injured and that the injury is not a generalized grievance shared in substantially equal measure by all or a large class of citizens. Id. On the other hand, an organization may gain standing as the representative of members of the organization who have interests which may be affected by the outcome of the proceeding. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-322, 3 NRC 328, 330 (1976). At the same time, when an organization claims that its standing is based on the interests of its members, the organization must identify specific individual members whose interests might be affected by the proposed action, describe how the interests of each of those members might be affected and give some concrete indication that such members wish to have their interests represented in the proceeding.

Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 396 and 397 (1979); Barnwell, ALAB-328, supra note 4, at 422-423; Public Service Electric & Gas Company (Salem Nuclear Generating Station, Units 1 and 2), ALAB-136, 6 AEC 487, 488-489 (1973); Duquesne Light Company (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 244 at n.2 (1973).

Further, under Section 2.713 of the Commission's Rules of Practice, a "partnership, corporation or unincorporated association may be represented by a duly authorized member or officer, or by an attorney-at-law." 10 C.F.R. § 2.713(b) (emphasis added). Thus, where an organization is represented by one of its members, the member must demonstrate authorization by that organization to represent it. This demonstration is normally required to be made in the written notice of appearance.^{5/} The Appeal Board has stated, however, that it is enough for standing purposes that a petition for an organization be signed by "a ranking official of the organization who himself had the requisite personal interest to support an intervention petition." Duke Power Company (Amendment to Materials License SNM-1773 - Transportation of Spent Fuel From Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC, 146, 151 (1979).

^{5/} 10 C.F.R. § 2.713 provides, in part:

Any person appearing in a representative capacity shall file with the Commission a written notice of appearance which shall state his or her name, address, and telephone number; the name and address of the person on whose behalf he or she appears; and, in the case of an attorney-at-law, the basis of his or her eligibility as a representative or, in the case of another representative, the basis of his or her authority to act on behalf of the party.

Finally, groups may not represent persons other than their own members, and individuals may not assert the interest of other persons. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-77-11, 5 NRC 481, 483 (1977); watts Bar, ALAB-413, supra at 1421; Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit No. 2), ALAB-470, 7 NRC 473, 474 n.1 (1978). There is, under the Atomic Energy Act and the Commission's regulations, 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, LBP-77-11, supra at 483.

2. Petitioners Must Meet the "Aspect" Requirements of 10 C.F.R. § 2.714

In addition to demonstrating "interest", a petitioner must set forth "the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene." 10 C.F.R. § 2.714(a)(2).^{6/} While there is little guidance in NRC case law as to the meaning of "aspect" as the term is used in 10 C.F.R. § 2.714, it appears that a petitioner may satisfy this requirement by identifying general potential effects of the licensing actions or areas of concern

^{6/} 10 C.F.R. § 2.714 also requires the petitioner to file "...a supplement to his petition to intervene which must include a list of the contentions which petitioner seeks to have litigated in the matter, and the bases for each contention set forth with reasonable specificity". This section further provides: "A petitioner who fails to file such a supplement which satisfies the requirements of this paragraph with respect to a least one contention will not be permitted to participate as a party." The NRC Staff will respond to the contentions set forth in any supplements after their receipt. Accordingly, nothing said herein by the Staff regarding a petitioner's "aspects" is intended to apply in any way to a petitioner's satisfaction of the 10 C.F.R. § 2.714 contention requirements.

which are within the scope of matters that may be considered in the proceeding. See North Anna, ALAB-146, supra at 633; Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), Licensing Board "Memorandum and Order Ruling on Petitions and Setting Special Prehearing Conference", dated September 21, 1979, slip. op. at 6 (unpublished Order).

B. Decade's Petition For Leave To Intervene Does Not Establish That Organization's Standing To Intervene In This Proceeding

1. "Interest" Requirements

Decade petitioned for leave to intervene on its own behalf and on behalf of its members. Decade asserts that it is a corporation organized "...to protect and enhance the quality of the human environment against, among other things, the hazards of nuclear power." Petition at 1. This is a generalized interest not sufficient to support standing of Decade in this proceeding. See Ten Applications, CLI-77-24, supra; Barnwell, ALAB-328, supra n.4.

Furthermore, Decade's asserted injury to ratepayers of raised rates cannot support standing of Decade on its own behalf or on behalf of its members because such an injury is not with the "zone of interests" protected by either the Atomic Energy Act or the National Environmental Policy Act and is, therefore, not cognizable in NRC licensing proceedings. See Pebble Springs, CLI-76-27, supra; Wolf Creek, ALAB-424, supra.

Decade has also petitioned for leave to intervene based on its concern for the health and safety of certain members of its organization. Petition at 2. It appears from Decade's petition that at least some of the named members reside in the "geographical proximity" to

Point Beach, Unit 1. See North Anna, ALAB-522, supra.^{7/} However, the Appeal Board has noted that for an organization to gain standing based on the interests of a member "...there must be some concrete indication that, in fact, the member wishes to have that interest represented in the proceeding." Allens Creek, ALAB-535, supra at 396. Such showing has not been made here. Until such a showing is made, Decade's petition is defective. This showing should, to provide a concrete indication of authorization, involve a written statement on the part of the member or members authorizing such representation by Decade.

Furthermore, as discussed above, 10 C.F.R. § 2.713 of the Commission's regulations provides that an organization may be represented by a duly authorized member or officer or by an attorney at law. Decade's petition is signed by Peter Anderson as a Co-Director. However, there is no indication that he has been authorized to represent Decade's intervention in this proceeding.

Even though Decade has been participating in another proceeding concerning the instant facility, absent some indication from Decade, it would be less than clear whether Decade has authorized intervention in this separate proceeding. It is true that the Appeal Board has assumed such representation for standing purposes where "...the petition had been signed by a ranking official of the organization who himself had

^{7/} The Petition alleges that Joseph and Lavinia Dworak reside in Whitelaw, Wisconsin and that Ann and Paul Kortens reside in Two Rivers, Wisconsin. Petition at 2. Whitelaw, Wisconsin appears to be within 20 miles and Two Rivers, Wisconsin appears to be within 10 miles of Point Beach, Unit 1.

the requisite personal interest to support an intervention petition." Amendment to Material License - Oconee, ALAB-528, supra. Here, however, the petition does not demonstrate that Peter Anderson, the signer of the petition, has the requisite personal interest to support an intervention petition. In fact, the petition makes no attempt to show how Peter Anderson could be harmed by the outcome of this proceeding. Therefore, this petition fails to demonstrate that Decade has authorized intervention and that the signer of the petition has been authorized to act as its representative in this proceeding.

2. "Aspects" Requirements

Under the heading "Effects of Order" Decade asserts that the "aspects" of the license amendment that concern it are radiation releases of unsafe levels caused by "primary-to-secondary or secondary-to primary leakage through ruptured steam generator tubes" and whether the proposed modifications "provide adequate assurance" that such releases will not occur. Petition at 2. The Staff believes that this statement of "aspect" satisfies the requirement of identifying general potential effects of the proposed licensing action and an area of concern to Decade which is within the scope of the matters to be considered in the proceeding. See North Anna, ALAB-146, supra at 633; Three Mile Island, supra, slip op. at 6.

C. The Board Should Not, As A Matter of Discretion, Grant Decade's Petition

Although the Petitioner lacks standing to intervene as of right under judicial standing concepts and NRC precedent, it may nevertheless be admitted to the proceeding in the Licensing Board's discretion.

In determining whether discretionary intervention should be permitted, the Commission has indicated that the Board should be guided by the following factors, among others:

- a) Weighing in favor of allowing intervention --
 - 1) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
 - 2) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.
 - 3) The possible effect of any order which may be entered in the proceeding on the petitioner's interest.
- b) Weighing against allowing intervention --
 - 4) The availability of other means whereby petitioner's interest will be protected.
 - 5) The extent to which the petitioner's interest will be represented by existing parties.
 - 6) The extent to which petitioner's participation will inappropriately broaden or delay the proceeding.

Pebble Springs, CLI-76-27, supra at 616.

The primary factor to be considered is the significance of the contribution that a petitioner might make. Id. Thus, foremost among the factors listed above is whether the intervention would likely produce a valuable contribution to the NRC's decision-making process on a significant safety or environmental issue appropriately addressed in the proceeding in question. Watts Bar, ALAB-413, supra.

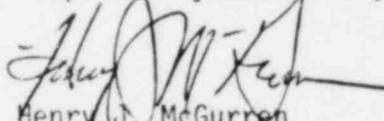
While Decade presents no argument on the issue of discretionary intervention, upon review of Decade's petition in its entirety, the Staff concludes that the group does not fall within the guidelines

outlined in Pebble Springs, CLI-76-27, supra. The petition to intervene discloses no expertise possessed by Decade or any of its members which could contribute in a positive way to the proceeding on the requested license amendment. In this instant matter, items (a) (1) and (2) and (b) (6) all militate against the petitioner. However, consideration of items (b) (4) and (5) appears to favor admitting intervention. There seems to be no other vehicle at the current time for the interests of Decade's members to be represented in this proceeding. No basis has been provided for weighing item (a) 3. In sum, consideration of factors involved in discretionary intervention as presently submitted do not favor admission of Decade as a matter of the Board's discretion.

III. CONCLUSION

For the above stated reasons, the instant petition fails to satisfy the "interest" requirement of 10 C.F.R. § 2.714(a)(2) and should be denied. Further, the Board should not, as a matter of discretion, grant Decade's petition.

Respectfully submitted,


Henry J. McGurren
Counsel for NRC Staff


Richard G. Bachmann
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 30th day of August, 1982

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

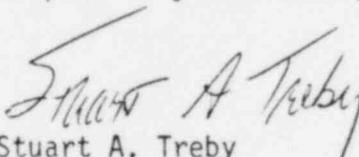
In the Matter of)
WISCONSIN ELECTRIC POWER COMPANY) Docket No. 50-266 - OLA2
(Point Beach Nuclear Plant,)
Units 1 and 2))

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with § 2.713, 10 C.F.R. Part 2, the following information is provided:

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Telephone Number - Area Code 301-492-8661
Admission - Supreme Court of the United States
Court of Appeals for the State of
New York
Name of Party - NRC Staff
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Respectfully submitted,


Stuart A. Treby
Assistant Chief Hearing Counsel
for NRC Staff

Dated at Bethesda, Maryland
this 30th day of August, 1982

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
WISCONSIN ELECTRIC POWER COMPANY) Docket No. 50-266 - OLA2
(Point Beach Nuclear Plant,)
Units 1 and 2))

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with § 2.713, 10 C.F.R. Part 2, the following information is provided:

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Name of Party - NRC Staff
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Respectfully submitted,



Richard G. Bachmann
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 30th day of August, 1982

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
) Docket Nos. 50-266 - OLA2
WISCONSIN ELECTRIC POWER COMPANY)
)
(Point Beach Nuclear Plant,)
Units 1 and 2))

CERTIFICATE OF SERVICE

I hereby certify that copies of "RESPONSE OF THE NRC STAFF TO PETITION FOR LEAVE TO INTERVENE FILED BY DECADE," and Notices of Appearance for Stuart A. Treby, Henry J. McGurren and Richard G. Bachmann 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 30th day of August, 1982.

Peter B. Bloch, Chairman*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

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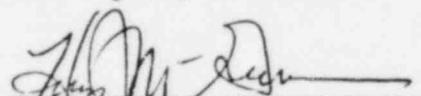
Atomic Safety and Licensing Board
Panel*
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Dr. Jerry R. Kline*
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