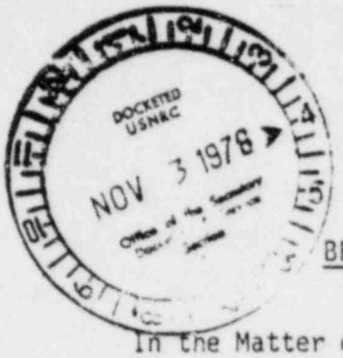
50-237



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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket Nos. 50-237
COMMONWEALTH EDISON COMPANY	)	50-249
	)	50-254
(Dresden Station, Units 2 and 3, and	)	50-265
Quad Cities Station, Units 1 and 2)	)	

NRC STAFF RESPONSE TO NATURAL RESOURCES DEFENSE COUNCIL'S RESPONSE TO STAFF'S AND APPLICANT'S ANSWERS TO PETITION FOR LEAVE TO INTERVENE

On October 10, 1978, Natural Resources Defense Council, et al. (hereafter NRDC) filed a request to file a response to Applicant's (and Staff's)[1/] response in opposition to NRDC's petition to intervene as a party under 10 CFR §2.714. That request was granted by the Licensing Board on October 13, 1978. NRDC filed their response on October 23, 1978. For the reason set forth below, NRC Staff continues to believe that NRDC has not adequately demonstrated its standing to intervene as a matter of right considering all matters contained in NRDC's initial petition, dated September 21, 1978, and NRDC's response of October 23, 1978. Moreover, NRDC now attempts to evade the question of standing, as that concept has been traditionally understood and decided, by attempting to characterize the issue as involving an NRC effort to compel the production of NRDC's entire

1/ NRC Staff's answer to NRDC's petition was served by mail on October 10, 1978, the same day as NRDC's Request to File a Response to Applicant's Answer.

membership lists. NRC Staff, like NRDC, believes that such lists are not here relevant, and that they may, in fact, be entitled to some unspecified protections against disclosure which need not be determined here; however, these lists, standing alone, are of no bearing on the question of standing now before this Licensing Board.

A. Standing to Intervene is Posited on Identification of Individuals and Their Interests to be Affected

The NRC Staff submits that the applicable Commission regulations and case law admit to a single interpretation: namely, that petitioners must state with particularity their interest in the proceeding and how that interest may be affected by the results of that proceeding in order to establish standing. See 10 CFR §2.714(d). Intervention as a matter of right in Commission licensing hearings is governed by judicial concepts of standing, which require that the petitioner demonstrate a personal interest in the outcome of the proceeding and that the interest is at least arguably within the "zone of interests" protected by the statute invoked. Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-614 (1976). An organization may be found to have standing to intervene if it can show that it or its members have such an interest. Allied General Nuclear Services, et al. (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420 (1976).

When an organization's standing is based upon the interests of its members, it must identify one or more individual members, describe

specifically how their interests will be affected by the proposed action and demonstrate that those members have authorized the organization to act on their behalf. Allied General Nuclear Services, et al. (Barnwell Fuel Receiving and Storage Station), ALAB-328, supra at 422-23; Public Service Electric and Gas Company (Salem Nuclear Generating Station, Units 1 and 2), ALAB-136, 6 AEC 487, 488-89 (1973); Duquesne Light Company, et al. (Beaver Valley Power Station, Unit 1), ALAB-108, 6 AEC 243, 244 at n. 2 (1973).

An examination of the facts in the Barnwell case is instructive. There, as to ACLU/SC's petition to intervene, even an individual member's affidavit attesting to the truth of the petition was found insufficient to support standing, where affiant did not specify her particular civil liberties or property interests believed to be affected by approval of the proposed action. Not only does the NRDC/CBE petition here fail to present a particularized statement of any individual member's interest in the proceeding and how such interest would be affected by the proposed action; it fails to identify even one member who has such an interest.

NRDC's reliance on the Marble Hill[2/] case is misplaced. That case simply held that an organization may represent the interests of its members without showing that its corporate interests are also adversely affected. It then applied this rule and affirmed a finding of standing where affidavits of a member and the organization's

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2/ Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-322, 3 NRC 328 (1976).

director established the interest of the member. It is, of course, NRDC's refusal to identify such an affected member, his interest, and his willingness to have NRDC represent that interest, which distinguishes this case.

Finally, the line of judicial decisions allowing organizations to represent the interests of their members does not support admission of NRDC as a party without amplification of its petition to intervene.[3] While perhaps enlarging the sphere of cognizable interests which might support standing, those cases reaffirmed the requirement that one seeking judicial review of administrative action must have suffered an "injury in fact," alleged in a manner capable of proof at trial. Further, in no way have these cases impaired the basic legal principle that one party may not represent another without express authority to do so.[4] The NRC Staff submits that it is upon this latter point that NRDC's petition must fail. While alluding to rights and affected interests of unnamed members presumably within the protected sphere of interests, the petition fails to allege NRDC's authorization by those members to serve as their representative in this litigation. While the "overwhelming support" of such members of NRDC and CBE for their organizations' nuclear activities is asserted, intervention is alleged to have been authorized not by such affected members, but "by the Staff

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3/ See, e.g., Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333 (1977); Warth v. Seldin, 422 U.S. 490 (1976); United States v. SCRAP, 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972).

4/ Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1) LBP-77-11, 5 NRC 481 (1977).

and Legal Committee of the NRDC Board of Trustees as part of its general authorization of our efforts to assure a rational approach to the problem of spent fuel storage," and "by the President of CBE." (Petition, p. 2) The petition concludes with the statement that "[p]etitioners have long been opposed to ad hoc efforts to deal with short-term pressures created by the absence of a permanent nuclear waste storage solution," clearly the unspecific "public interest" (as opposed to member interest) motivation which led the United States Supreme Court to deny standing in Sierra Club v. Morton.

B. Disclosure of Organizational Membership Lists is Not Sought by NRC, and Thus is Not an Issue in this Proceeding

NRDC attempts to avoid the basically factual issues involved in establishing standing by seeking to invoke protection against the disclosure of its membership lists. The NRC Staff submits that the requirement of identifying at least one member whose specific rights and interests may be examined in the hearing context, simply does not raise the constitutionally mandated balancing called for when compelled disclosure of organizational membership lists is sought.

Initially, it should be obvious that the Supreme Court's opinion in NAACP v. Alabama[5/] does not vitiate the requirement of identification of parties in litigation. The Court there was faced with Alabama's attempt to obtain the NAACP's entire membership lists under the guise of enforcing compliance with that State's foreign corporation statute. Finding a chilling effect upon freedom of

5 / 357 U.S. 449 (1958).

association produced by such statute, which was not relevant to the organization's "doing business" within the State, the Court did not require disclosure, noting that the organization had "made an uncontroverted showing" of past harms to known members upon revelation of their identity.[6] More important a distinction, however, is the fact that the governmental agency was seeking to compel disclosure of the membership lists, as a predicate to virtually all aspects of the organization's existence within the state. Such a case, and the atmosphere in which it occurred, bears no resemblance to the nuclear licensing procedures challenged here. The Commission's regulations and precedent do not require, nor seek, membership lists of petitioner. All that is sought is the identification of at least one individual member, and a specification of that person's potentially affected interests, so that such factors may be adjudicated in the public hearing requested by such presently unnamed individual(s), as provided by the regulations and the Atomic Energy Act. Absent such specifically identified potential harms to at least one person, there is no basis for requiring a hearing on the merits of the general issues asserted by NRDC. Sierra Club v. Morton, supra.

Subsequent Supreme Court decisions, such as Buckley v. Valeo[7] make clear that disclosure of identity as a condition of undertaking a certain activity (there, the making of a political campaign

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6 / 357 U.S. at 462. Harms cited there far exceed the speculative and vague allegations in the three affidavits attached to NRDC's response.

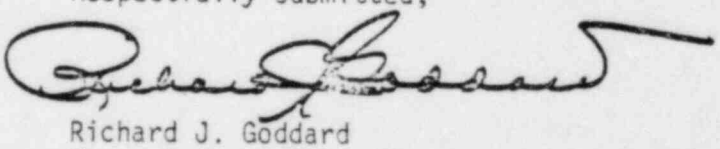
7 / 424 U.S. 1 (1976).

contribution in excess of $10), even if the activity is constitutionally protected, is not invariably prohibited. Disclosure was upheld in Buckley, as serving substantial government interests which outweighed any potential infringement upon First Amendment rights. NRC Staff submits that the mere identification of one person here who is allegedly to be harmed,[8/] actually or potentially, and who seeks to have NRDC invoke his statutory right to a hearing, presents a de minemis threat to petitioner's organizational rights when balanced against the substantial commitment of time, money and manpower incurred when the administrative processes provided for such person(s)' protection are to be set in motion.

CONCLUSION

For the above reasons, NRC Staff opposes NRDC's right to intervene, based upon its initial petition, and upon its response of October 23, 1978, if further amendment or supplementation thereof is not forthcoming.

Respectfully submitted,



Richard J. Goddard
Counsel for NRC Staff

Dated at Bethesda, Maryland,
this 3rd day of November, 1978

8/ The identification of many of such members, who have previously participated in NRC proceedings, is already known. A case in point is David D. Comey, author of one of the affidavits attached to the petition. The identification of at least one member is properly required in order that such individual's specific interests, and particularized harms to such interests, may be examined in the context of an adversary hearing.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO NATURAL RESOURCES DEFENSE COUNCIL'S RESPONSE TO STAFF'S AND APPLICANT'S ANSWERS TO PETITION FOR LEAVE TO INTERVENE," 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 Commissions's internal mail system, this 3rd day of November, 1978.

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