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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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| In the Matter of | ) | |
| | ) | |
| ARIZONA PUBLIC SERVICE COMPANY, *ET AL.* | ) | Docket Nos. 50-528-OLA<br>50-529-OLA<br>50-530-OLA |
| | ) | |
| (Palo Verde Nuclear Generating Station, Units 1, 2 & 3) | ) | (Shutdown Cooling Flowrate) |
| | ) | |

NRC STAFF RESPONSE TO PETITIONS FOR LEAVE TO INTERVENE FILED BY ALLAN L. MITCHELL, LINDA E. MITCHELL, MYRON L. SCOTT, BARBARA S. BUSH AND THE COALITION FOR RESPONSIBLE ENERGY EDUCATION

## I. INTRODUCTION

On January 21, 1991 and on January 22, 1991 respectively, Allan L. Mitchell and Linda E. Mitchell, and Myron L. Scott, Barbara S. Bush and the Coalition for Responsible Energy Education ("CREE") filed two petitions for leave to intervene[1] and requested a hearing on the November 20, 1990 application of the Arizona Public Service Co., *et al.*, for a license amendment revising the technical specifications relating to the minimum required shutdown cooling flowrate. Notice of the Commission's consideration of the proposed amendment and opportunity for hearing was published in the *Federal Register* on December 21, 1990 (55 Fed. Reg. 52337-39).

Under the proposed amendment, the required flowrate would be reduced from 4000 gpm to 3780 gpm to provide additional margin for preventing air entrainment while the reactor coolant system is partially drained. *Id.* at 52337. After evaluating the

[1]Petition For Leave to Intervene and Request for Hearing filed by Allan L. and Linda E. Mitchell, dated January 21, 1991 ("Mitchell Petition") and Petition For Leave to Intervene and Request For Hearing filed by Myron L. Scott, Barbara S. Bush and the Coalition for Responsible Energy Education ("CREE"), dated January 22, 1991 ("CREE Petition").



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proposal, the NRC Staff concluded that the amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated, (2) create the possibility of a new or different kind of accident from any accident previously evaluated, or (3) involve a significant reduction in a margin of safety. *Id.* at 52337. Accordingly, the Staff proposed to determine that the amendment involved no significant hazards consideration under 10 C.F.R. § 50.92(c).

The *Federal Register* notice also contained a discussion of the filing of requests for hearing and petitions for leave to intervene. Specifically, the notice stated that the licensees could request a hearing with respect to issuance of the amendment and that "any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding" must file a written petition for leave to intervene in accordance with 10 C.F.R. § 2.714. *Id.* at 52338. The notice further stated that petitions should specifically explain the reasons why intervention should be permitted with particular reference to the factors listed in 10 C.F.R. § 2.714(d) and identify the specific aspect of the subject matter of the proceeding as to which the petitioner wishes to intervene. *Id.* at 52338.

As set forth below, the petitioners have not made the requisite showing under 10 C.F.R. § 2.714(a) that their interests would be adversely affected by the proposed amendment. In addition, petitioners have failed to identify a specific aspect of the subject matter of the proceeding as to which they wish to intervene as required by that regulation.

## II. DISCUSSION

### 1. Legal Standard

Section 189(a)(1), 42 U.S.C. § 2239(a)(1), of the Atomic Energy Act provides, in pertinent part, that:

> In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, . . . the 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 the proceeding.

(emphasis added). The implementing regulation, 10 C.F.R. § 2.714 provides in subsection (a)(1) 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." Under that regulation, the petition also must:

> set forth *with particularity* the interest of the petitioner in the proceeding, *how that interest may be affected by the results of the proceeding*, including the reasons why petitioner should be permitted to intervene, with particular reference to the factors in paragraph (d)(1) of this section, and the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene.

(emphasis added). The factors set forth in paragraph (d)(1) are:

> (i) The nature of the petitioner's right under the Act to be made a party to the proceeding.
>
> (ii) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.
>
> (iii) The possible effect of any order that may be entered in the proceeding on the petitioner's interest.

The Commission has long held that judicial concepts of standing will be applied in determining whether a petitioner has sufficient interest in a proceeding to be entitled to intervene as a matter of right under Section 189 of the Act. *See, e.g., Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1) ("TMI"), CLI-83-25, 18 NRC 327,

332 (1983), *citing Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976). The Commission has further held that these judicial concepts require a showing that (a) the action will cause "injury in fact", and (b) that the injury is "arguably within the zone of interest" protected by the statutes governing the proceeding. *TMI*, 18 NRC at 332; *Pebble Springs*, 4 NRC at 613. In order to establish standing, the petitioner must show (1) that he has personally suffered a distinct and palpable harm that constitutes injury-in-fact; (2) that the injury fairly can be traced to the challenged action; and (3) that the injury is likely to be redressed by a favorable decision in the proceeding. *Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988). *Cf. Nuclear Engineering Co.* (Sheffield, Ill. Low Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978) (there must be a concrete demonstration that harm could flow from the result of a proceeding).

When the petitioner is an organization, it may meet the injury in fact test for standing either by demonstrating an effect upon its organizational interest or by alleging that its members, or at least one, is suffering immediate or threatened injury. *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-549, 9 NRC 644, 646-47, *citing, Warth v. Seldin* 422 U.S. 490 (1975); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1437 (1982), *citing Sierra Club v. Morton* 405 U.S. 727 (1972). In order to make the requisite showing as to the latter factor, the organization must provide identification of at least one member who will be injured, a description of the nature of the injury, and an authorization for the organization to represent the individual. *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 390-96 (1979).

As discussed below, the petitions fail to make the requisite showing that petitioners would sustain "injury in fact" and should be dismissed on that basis alone. Nor have Petitioners set forth with the requisite particularity their interests in the proceeding or how their interests would be adversely affected by the results of the proceeding. In addition, the petitions should be dismissed because they fail to set forth the specific aspect of the subject matter of the proceeding as to which Petitioners wish to intervene as required by 10 C.F.R. § 2.714(a)(2). Accordingly, the both petitions to intervene should be denied.

2. The CREE Petitioners Lack the Requisite Interest To Intervene

Petitioners Myron Scott, Barbara Bush and CREE ("CREE Petitioners") allege that their interest in the proposed license amendment is evident from the fact that they are:

1. Residents of the County of Maricopa, located in the State of Arizona;

2. property owners within the County of Maricopa;

3. customers of utility members of the Palo Verde ownership consortium, including Arizona Public Service and Salt River Project;

4. citizens of the State of Arizona and the United States of America; and

5. individuals with an interest in their own health and safety and the public health and safety.

CREE Petition at 2. As for the impact of the proposed amendment on these interests, the CREE Petitioners claim that their health, safety, property, and utility rates, and those of the public, could be affected by an order granting the requested amendment. *Id.*

None of the facts cited by the CREE petitioners is sufficient to establish their standing to intervene in this proceeding. Clearly, the fact that these petitioners are citizens of the Sate of Arizona and of the United States of America with an interest in the health and safety and utility rates of the public is not sufficient to establish standing to intervene. It is well established that a petitioner must have a "real stake" in the outcome to establish the requisite "injury-in-fact" for standing. *See generally Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 447-448 (1979), and cases cited therein. Thus, general economic concerns such a facility's impact on utility rates or the local economy fail to provide an adequate basis for intervenor standing. *Public Service Co. of New Hampshire* (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975, 978 (1984) (Such economic concerns should more appropriately be raised before state economic regulatory agencies); *Washington Public Power Supply System* (WPPSS Nuclear Project No. 1), ALAB-771, 19 NRC 1183, 1190 (1984); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-789, 20 NRC 1443, 1447 (1984). A general interest in the health and safety of the public at large is also not sufficiently particularized to warrant intervention. *TMI*, 18 NRC at 332.

While CREE Petitioners do have a direct interest in their utility rates as customers of the Palo Verde ownership consortium, their economic interest as ratepayers is not within the scope of interests protected by the Atomic Energy Act (AEA) or the National Environmental Policy Act (NEPA). *Portland General Electric Company* (Pebble Springs Nuclear Plant, Units 1 & 2), ALAB-333, 3 NRC 804, 806; *Pebble Springs, supra*, 4 NRC at 614 (1976). Likewise, petitioners' economic interests as taxpayers is outside the zone of interests protected by the AEA and the NEPA. *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-333, 3 NRC 804 (1976).

CREE Petitioners' only remaining claim of interest in the proposed amendment is the fact that Mr. Scott and Ms. Bush live and own property within the same county as the Palo Verde Generating Station.[2] Regarding their proximity to the Palo Verde Nuclear Generating Station, Petitioners state that Myron L. S[illegible] and Barbara S. Bush live and own a home in the City of Tempe. However, they do not state exactly where that home is located, and it appears that portions of the city are more than 50 miles away from the generating station. Thus, on its face, the CREE petition fails to make any showing that petitioners reside within the geographical zone that might be affected by operation of the Palo Verde plant.

In sum, Petitioners Myron Scott, Barbara Bush and "CREE" have failed to particularize any interests in the proposed amendment which are protected by the AEA or NEPA and which could be adversely affected by the decision of the Commission whether to issue the proposed amendment. The "CREE" Petition should therefore be denied on the basis that Petitioners lack standing to intervene.

3. Neither The CREE Nor the Mitchell Petitioners Have Identified Any "Injury in Fact"

The request for intervention filed by Allan and Linda Mitchell ("Mitchell Petitioners") is premised upon the fact that they reside and own property within a five mile radius of the Palo Verde Generating Station, that Mrs. Mitchell is an employee of the plant, and that both are knowledgeable about the operation of the plant. Mitchell Petition at 1-2. They state that they have an interest in "the proceedings regarding the

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[2] While the petition does refer to other Cree members who reside at varying distances from the station, only persons who are identified by name and address may establish standing of an organization. *Detroit Edison Company* (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 583 (1978).

operation of Palo Verde since they live and own property within five (5) miles of the plant" and because "Mrs. Mitchell has a financial interest in the operation of the plant." *Id.* at 2. Further, they state that they "have an interest in protecting the health and safety of themselves and the public at large," and that "[p]etitioners' health and safety as well as the value of their property could be affected by an order granting the request for amendment, particularly in the event of an accident during plant shutdown." *Id.*

While Mitchell Petitioners have identified interests which are protected by statutes governing the proceeding, they have failed to specify how the amendment would adversely affect those interests. As such, they have failed to show the requisite "injury in fact" to confer standing to intervene. While they refer to the possibility of an accident during plant shutdown they do not allege, nor it is evident from the proposed amendment, that such an accident could be more likely if the amendment is granted or that any such accident would have offsite consequences which would affect their property, health or safety. To the contrary, the NRC Staff has determined that "[t]he proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated but actually enhances the safety of operation of the shutdown cooling system". 55 *Fed. Reg.* at 52337. Despite Petitioners' close proximity to the plant, some specific "injury in fact" must be alleged when the proposed amendment, such as this one, does not concern major alterations to the facility with a clear potential for offsite consequences.[3]

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[3]The NRC Staff described the proposed amendment as a change resulting from the application of a small refinement of a previously used calculational model or design method. In this case, a reanalysis demonstrated that the proposed minimum flowrates meet the requirements of the original analysis. 55 *Fed. Reg.* 52338. Thus, the system would still perform within its design bases and there would be no reduction in the margin of safety associated with its operation. *Id.* at 52338.

Likewise, even assuming that Petitioners Myron Scott, Barbara Bush and CREE were shown to reside within fairly close proximity to the station, they fail to identify any specific "injury in fact" that would result from the proposed amendment. While intervention on the basis of proximity to a plant has been granted for distances as much as 50 miles when a utility is applying for an operating or construction license because there are scenarios under which effects might be felt at that distance, the same is not true when a license amendment is involved. Unlike a situation where the Commission is being asked to approve construction or operation of a nuclear plant, with all the attendant potential for offsite effects, here the utility is seeking an amendment of an existing operating license. As the Commission explained in *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2) CLI-89-21, 30 NRC 325, 329:

> It is true that in the past, we have held that living within a specific distance from the plant is enough to confer standing on an individual or group in proceedings for construction permits, operating licenses, or significant amendments thereto such as the expansion of the capacity of a spent fuel pool. *See, e.g. Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-522, 9 NRC 54 (1979). However, these cases involved the construction or operation of the reactor itself, with clear implications for the offsite environment, or major alterations to the facility with a clear potential for offsite consequences. *See, e.g., Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-183, 8 AEC 222, 226 (1974). Absent situations involving such obvious potential for offsite consequences, a petitioner must allege some specific "injury in fact" that will result from the action taken. . .

Because the proposed amendment does not concern a major alteration to the facility with a clear potential for offsite consequences and petitioners have not alleged that they would suffer any distinct and palpable harm, *i.e.*, injury in fact, if the amendment is granted, they have failed to satisfy the requirements of 10 C.F.R. § 2.714(a)(2) to establish standing. As discussed above, that regulation expressly provides

that petitions for leave to intervene set forth *with particularity* how the interest of the petitioners would be affected by the proceeding.

4. Neither The CREE Nor The Mitchell Petitioners Have Set Forth the Specific Aspect Of The Subject Matter As To Which They Wish To Intervene.

Both the Mitchell and CREE Petitions should be denied for the additional reason that Petitioners have failed to set forth the specific aspect of the subject matter of the proceeding as to which they wish to intervene. Indeed, Petitioners Myron Scott, Barbara Bush and CREE do not even refer to the amendment involved, and Petitioners Allan and Linda Mitchell do not even hint at their objection to the proposed amendment, much less identify the particular aspect of the issuance as to which they wish to intervene. Instead, Petitioners Allan and Linda Mitchell state that they seek to exercise their rights regarding "issues affecting the operation Palo Verde." Mitchell Petition at 2. For this additional reason both petitions fail to meet the plain requirements of 10 C.F.R. §2.714(a)(2).

## CONCLUSION

For the reasons set forth above, the petitions to intervene and request for a hearing of Allan and Linda Mitchell and Myron Scott, Barbara Bush and CREE should be denied.

Respectfully submitted,

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Dated in Rockville, Maryland
this 11th day of February, 1991