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DOCKETED  
LBP-91-4

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

'91 FEB 19 P2:53

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:  
Ivan W. Smith, Chairman  
Dr. Walter H. Jordan  
Dr. Jerry R. Kline

SERVED FEB 19 1991

In the Matter of  
ARIZONA PUBLIC SERVICE  
COMPANY, et al.  
  
(Palo Verde Nuclear Station,  
Unit Nos. 1, 2 and 3)

Docket Nos. 50-528-OLA-2  
50-529-OLA-2  
50-530-OLA-2  
ASLBP No. 91-633-05-OLA-2  
  
(Allowable Setpoint  
Tolerance)

February 19, 1991

MEMORANDUM AND ORDER  
(Ruling upon Petitions for Leave to Intervene)

I. Background

On December 27, 1990, the Commission published in the Federal Register notice that the NRC is considering issuing amendments to the operating licenses of the Palo Verde Nuclear Generation Station, Units 1, 2, and 3, held by the Licensees, Arizona Public Service Co., et al., 55 Fed. Reg. 53220-21. The notice explained that the proposed changes:

would increase the allowable setpoint tolerance for the pressurizer safety valves from 2500 psia plus or minus 1% to 2500 psia plus 3% or minus 1%; increase the allowable setpoint tolerance for the main steam safety valves from 1250 psig and 1315 psig plus or minus 1% to the same settings plus or minus 3%; reduce the minimum required feedwater flow from 750 gpm to 650 gpm; and reduce the

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response time for the high pressurizer pressure reactor trip from 1.15 seconds to 0.5 seconds.

Id. at 53220.

The notice also explained the opportunity for any person whose interest may be affected by the amendments to request a hearing and to file a petition for leave to intervene. The general provisions of the Commission intervention regulation, 10 C.R.R. § 2.714, were set out in the notice. Two timely petitions for leave to intervene and requests for hearing were filed. This Atomic Safety and Licensing Board was established to rule on such petitions and requests and to preside over any resulting proceeding by order of the Acting Chief Administrative Judge on January 29, 1991.

## II. Petitioners

A petition dated January 22, 1991 was filed by Myron L. Scott and Barbara S. Bush, husband and wife, who own a home and reside in Tempe, Arizona. We refer to Mr. Scott and Ms. Bush hereinafter as the "Scott/Bush Petitioners," recognizing that they also are petitioning in behalf of the Coalition for Responsible Energy Education (CREE), which, in turn, is a project of Arizonans for a Better Environment (ABE).

Attorneys for Allan L. Mitchell and Linda E. Mitchell (hereinafter "Mitchell Petitioners") filed a petition dated



January 28, 1991. The Mitchells reside within five miles of the Palo Verde Station and Mrs. Mitchell is an employee of Arizona Public Service Co. at the Palo Verde Station.

Both petitions seek leave to intervene and request a hearing pursuant to the provisions of 10 C.F.R. § 2.714. Licensees<sup>1</sup> and the NRC Staff<sup>2</sup> oppose the petitions.

### III. The Intervention Rule

The NRC intervention rule, 10 C.F.R. § 2.714, as pertinent to the initial petition stage of an NRC proceeding provides:

Section 2.714(a)(2). The petition shall 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.

\* \* \* \* \*

Section 2.714(d)(1). [The presiding officer shall, in ruling on a] petition for leave to intervene or a request for a hearing, consider the following factors, among other things:

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<sup>1</sup>Licensees' Answer In Opposition to Petitions for Leave to Intervene and Requests for Hearing, February 6, 1991.

<sup>2</sup>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 (Staff Response), February 11, 1991. It would be helpful to the Board and parties, who must cite to the pleadings, if the parties would use succinct titles for their filings. Titles need only identify the pleading, not summarize them.

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(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.

Other provisions of the rule provide for the filing of amended petitions and supplements listing contentions as we discuss below.

#### IV. Standing to Intervene

Contemporaneous judicial concepts of standing will be applied in determining whether a petitioner has sufficient interest in an NRC proceeding to be entitled to intervene. It has been generally recognized that these judicial concepts involve a showing of "(a) the actions will cause 'injury in fact' and (b) the injury is arguably within the 'zone of interests' protected by the statutes governing that proceeding." Florida Power and Light Co. (St. Lucie, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989); citing Portland General Electric Co. (Pebble Springs, Units 1 and 2), CLI-76-27, 4 NRC 610, 614 (1976); Metropolitan Edison Co. (Three Mile Island, Unit 1), CLI-83-25, 18 NRC 327, 332-33 (1983).

Most often in NRC proceedings, but not always, whether a petitioner would sustain an "injury-in-fact" as a result



of an action covered by a proceeding has been determined by whether the petitioner lives or engages in activities near the nuclear plant in question. Thus a petitioner may demonstrate the potential for injury if the petitioner, or its members, live, work, or play, for example, in an area which might be affected by the release of nuclear radiation from the plant. A leading case on this point is Virginia Electric and Power Co. (North Anna, Units 1 and 2), ALAB-522, 9 NRC 54, 56-57 (1979), where the proceeding involved a proposed operating license amendment which would authorize the expansion of the spent fuel pool capacity. There the Appeal Board would not rule out as a matter of law derivative standing where a member of the petitioning organization lived about 35 miles from the facility, and where another member lived 45 miles away but engaged in canoeing in close proximity to the plant. Id. at 57.

Also, in North Anna, the Appeal Board noted that it had never required a petitioner in close proximity to a facility in question to specify the:

causal relationship between injury to an interest of a petitioner and the possible results of the proceeding [footnote omitted]. Rather, close proximity has always been deemed to be enough, standing alone, to establish the requisite interest.

Id. at 56, citing, e.g., Gulf States Utility Co. (River Bend, Units 1 and 2), ALAB-183, 7 AEC 222, 223-24 (1974) and cases there cited. See also Armed Forces Radiology Research

Institute (Cobalt-60 Storage Facility), ALAB-682, 15 NRC 150, 154 (1982).

It is especially noteworthy that the Scott/Bush petitioners, living in Tempe, Arizona, are said by the Licensees to live some 52 miles from the Station. The Staff notes that portions of Tempe are more than 50 miles from the Station. These are estimates from map measurements. The Scott/Bush Petitioners have not specified the distance.

Coincidentally, proximity of "approximately 50 miles" from a nuclear facility is the greatest distance, as far as we can find in NRC case law, that might support standing to intervene on proximity alone. Even that precedence is a rather weak finding by the Appeal Board that approximately 50 miles "is not so great as necessarily to have precluded a finding of standing . . . ." Tennessee Valley Authority (Watts Bar, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 n.4 (1977).

Since the Watts Bar decision, supra, licensing boards have routinely cited the 50-mile distance involved there as the outer limit for proximity-based standing to intervene. E.g., Detroit Edison Co., et al. (Enrico Fermi, Unit 2), LBP-79-1, 9 NRC 73, 78 (1979); Philadelphia Electric Co. (Limerick, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1433, (1982).

The NRC Staff would have us distinguish between a situation where the proceeding is for the construction or



operation of a nuclear plant compared to an amendment of an existing operating license. Staff Response at 8. In support of its argument the Staff (and Licensees) cite to the Commission decision in Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989):

It is true that in the past, we have held that living within a specific distance from the plant 's 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. . . .

Staff Response at 8.

The Staff is correct; St. Lucie is instructive. But, unfortunately for the Staff's argument, that decision instructs us that, even in a narrow-issue operating licensing amendment proceeding, as in North Anna (cited in St. Lucie and supra), proximity alone in the case of an operating license amendment proceeding can support standing to intervene.

As the Commission noted in St. Lucie, supra, the proposed amendment involved plant-worker protection -- air-purifying respirators in particular. The petitioner there was a member of the general public, not a worker. The proposed amendment had no potential for offsite consequences, thus no injury-in-fact to the petitioner. Id.; 30 NRC at 329-30.

As we are about to address whether the proposed changes at Palo Verde can support proximity-based standing to intervene, it should be noted that the only information we have about the proposed amendment is set out in the Federal Register notice and is cited above. Supra, at 1-2. For the purpose of establishing injury-in-fact to a petitioner's interest, we need not find that the petitioner's concerns are well founded. North Anna, supra, 9 NRC at 55-56. His responsibility to explain his concerns and to provide the bases for them will arise later at the contention-filing phase.

For now it is sufficient to observe that the proposed amendments involve changes to least four systems which are important to safety: pressurizer safety valves, main steam safety valves, reactor-heat removal via steam-generator feedwater flow, and reactor trip. The quantity of change seems to us at this time to be significant in each case. Whether the changes increase, or decrease, the potential for offsite consequences, they most assuredly involve such

potential. See St. Lucie, supra, 30 NRC 329-30.

Accordingly, we rule that standing in this proceeding can be established by proximity to the Palo Verde Station alone.

#### Mitchell Standing

The Mitchell Petitioners have easily established their standing by virtue of their residence within 5 miles of the station. In addition, the fact that Mrs. Mitchell is an onsite worker at the station is an even stronger factor involving injury-in-fact to her personal safety interests if the proposed amendments increase the risk of an accidental release. We need not address the other claims of standing set out in their petition.

#### Scott/Bush Standing

It would seem that the Scott/Bush Petitioners live about 50 miles from the Palo Verde Station. As noted above, in the Watts Bar decision, the Appeal Board explained that "approximately 50 miles" is not so far as to rule out standing based upon proximity -- nor do we rule it out. On the other hand we do not find from the petition that residing somewhere in Tempe in itself establishes standing. The 50-mile ruling was already very liberal and we are not inclined to extend it. We will hold the question of proximity-based standing in abeyance until the Scott/Bush



Petitioners provide further information in an amended petition, if they so choose.

The Scott/Bush Petitioners also assert standing by virtue of their status as members and officers of CREE and ABE. They state that a majority of CREE's members and directors reside in Maricopa County "at varying distances" from the Palo Verde Station.

Organizations can intervene in NRC proceedings in their own right or derive standing as the representative of their members. Houston Lighting and Power Co., et al. (South Texas, Units 1 and 2), ALAB-549, 9 NRC 644 (1979). But, the petitioning organization must explain why it or its members have standing. Houston Lighting and Power Co., et al. (Allens Creek, Unit 1), ALAB-535, 9 NRC 377 (1977). The Scott/Bush Petitioners do not explain any better than they explained for themselves how the interests of the CREE members are affected by the proceeding as a matter of proximity to the Palo Verde Station. We cannot discern how close to the station the CREE members live or whether any engage in activities near the station. Moreover, as a matter of proximity, the petitioners do not explain how the CREE and ABE organizations might have standing in their own right. At minimum, if Mr. Scott and Ms. Bush, on behalf of CREE, claim standing because one or more of CREE's members live or engage in activities in close proximity to the Palo Verde Station, those members should be identified by name

and exact location of the members' residence or activities with respect to the station.

The Scott/Bush Petitioners also claim standing for themselves and for CREE members as customers of the Palo Verde owners. This claim, however, will not establish standing to intervene. It has been long established that economic interests as rate payers do not fall within the "zone of interests" protected by the Atomic Energy Act. Portland General Electric Co., et al. (Pebble Springs, Units 1 and 2), CLI-76-27, 4 NRC 610, 614 (1976). See also Three Mile Island, Unit 1, supra, 18 NRC at 332 n.4.

The Scott/Bush Petitioners also assert that as citizens of the State of Arizona and of the United States they have an interest in the proposed amendments. There is, however, no causal connection between their political status as citizens and the proposed changes involved in this proceeding.

Accordingly, the Board rules that the Scott/Bush Petitioners, either for themselves or for CREE and ABE, have so far failed to establish standing to intervene in this proceeding. We will hold any ruling as to their final status to participate in the proceeding until they file their amended and supplemental petitions, if they choose to do so. The Board cautions Mr. Scott and Ms. Bush that any additional arguments in support of their claim of standing to intervene must be specific and sufficient to carry the

burden of establishing the right to participate in the proceeding. They will not be given a third chance to establish standing without meeting much more difficult pleading requirements relating to nontimely petitions. See Section 2.714(a)(3).

#### V. The "Aspect" Requirement

The intervention rule requires petitioners to state the "specific aspect or aspects of the subject matter for the proceeding as to which petitioner wishes to intervene." 10 C.F.R. § 2.714(a)(2). Licensees and the NRC Staff would have us deny both petitions on the grounds that neither meets the "aspect" requirements. Licensees' Answer at 11-13, Staff Response at 9. As the Licensees acknowledge, they have little guidance from NRC case law for their position. Licensees' Answer at 11-12.

The Board believes that the objection is misdirected in this case. Section 2.714 is the general intervention rule controlling intervention in all proceedings under Subpart G. Thus, in a full scope operating license proceeding, for example, petitioners might be expected to explain that they wish to intervene in, say, the ingestion-pathway emergency planning aspects, or perhaps financial qualifications, or management competence or whatever broad category of interest concerns them.



In this proceeding the aspects of the operating license proposed for amendment are already clearly set out in the Federal Register notice. Simply by petitioning to intervene a person whose interest may be affected by the proceeding has indicated the aspects as to which that person wishes to intervene. Petitioners need not be more particular until they file their list of contentions. Most important, the Licensees and the NRC Staff are well informed by early notice what any proceeding on the proposed amendments would be about. The Board believes that the "aspect" objections tended to be hypertechnical, unnecessary, and inconsistent with Licensees' stated interest in "expediting the resolution of this proceeding . . . ." Licensees Objections at 4-5 n.4.

#### Amended and Supplemental Petitions

The intervention rule provides that any person who has filed a petition for leave to intervene pursuant to the rule may amend his or her petition without prior approval of the presiding officer (i.e., Licensing Board). The rule also states, as pertinent, that the amendment may be made at any time up to fifteen days prior to the holding of the first prehearing conference. 10 C.F.R. § 2.714(a)(1)(3).

In addition, Section 2.714(b)(1) provides, as pertinent here, that not later than fifteen (15) days prior to the holding of the first prehearing conference, the petitioner

shall file a supplement to his or her petition to intervene that must include a list of the contentions which petitioner seeks to have litigated in the hearing.

As is often the case, the sequence and timing for the filing of amended and supplemental petitions under the rule must be changed by order of a presiding officer to provide for the efficient and rational management of the proceeding. In this case the Board sees no purpose to be served in calling a prehearing conference unless and until it has been established by the filing of at least one facially acceptable contention by a petitioner that a hearing might be required. Moreover, if the petitioners wait until fifteen days before the first prehearing conference to file amended and supplemental petitions, the answers to those petitions would not be in hands of the Board and parties until the very day of the prehearing conference at the earliest, and possibly several days later than the prehearing conference depending upon the mode of service. In short, the Board and parties would not be prepared to attend to the very business for which the prehearing conference is convened if the schedule set out in the rule is followed. Therefore the Board suspends that provision and sets its own schedule below.

The Mitchell Petitioners, having already established standing to intervene, need only file a supplement to their

petition with at least one acceptable contention to be admitted as parties to the proceeding.

The Scott/Bush Petitioners, having failed to establish standing to intervene, need to amend their petition if they wish to establish standing. They also need to supplement their petitions with at least one acceptable contention in order to be admitted as parties to the proceeding.

The Federal Register notice explained in detail the requirements for filing contentions in NRC proceedings.<sup>3</sup>

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<sup>3</sup>As pertinent, Section 2.714(b) provides:

(2) Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide the following information with respect to each contention:

(i) A brief explanation of the bases of the contention.

(ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.

(iii) Sufficient information (which may include information pursuant to paragraphs (b)(2)(i) and (ii) of this section) to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the



The Board recommends that the petitioners study the contention requirements of the rule carefully since the rule provides that a petitioner who fails to satisfy the requirements will not be admitted as a party. 10 C.F.R. § 2.714(b)(1).

#### VI. ORDER

Pleadings shall be filed in accordance with the following schedule:

Each petitioner may file no later than March 11 an amended petition and a supplement to petitions which include a list of contentions which petitioner seeks to have litigated in a hearing.

Licensees may file answers to amended petitions and supplements to petition within ten days after service of the amended petitions or supplements.

The NRC Staff shall file answers to amended petitions and supplements within fifteen days following their service.

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identification of each failure and the supporting reasons for the petitioner's belief. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner can amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's document.

The pleadings are to be in the hands of the Board and other parties on the date due. The Board anticipates that the participants will use overnight express mail or facsimile service to accomplish timely service.<sup>4</sup>

The Board intends to schedule a prehearing conference to take place approximately ten to twenty days following the NRC Staff's answers. Any need for petitioners to respond to the answers by petitioners may be made orally at the prehearing conference or as otherwise provided by Board order.

ATOMIC SAFETY AND LICENSING BOARD

*Walter H. Jordan by L. W. S.*

Walter H. Jordan  
ADMINISTRATIVE JUDGE

*Jerry R. Kline*

Jerry R. Kline  
ADMINISTRATIVE JUDGE

*Ivan W. Smith*

Ivan W. Smith, Chairman  
ADMINISTRATIVE LAW JUDGE

Bethesda, Maryland

February 19, 1991

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<sup>4</sup>Petitioners and participants should note that Board member Dr. Walter H. Jordan should be served at 881 W. Outer Drive, Oak Ridge, Tennessee 37830. FAX Number for the Licensing Board is (301) 492-7285.

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NUCLEAR REGULATORY COMMISSION

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(Palo Verde Nuclear Generating |  
Station, Units 1, 2 and 3) |  
|

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB M&D LBP-91-4 (RULING ...) have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

Atomic Safety and Licensing Appeal  
Board  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Administrative Law Judge  
Ivan W. Smith, Chairman  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Administrative Judge  
Jerry R. Kline  
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Docket No. (s) 50-528/529/530-DLA-2  
LB M&D LBP-91-4 (RULING ...)

Dated at Rockville, Md. this  
19 day of February 1991

  
Office of the Secretary of the Commission

\*Served upon by Federal Express.