

03/14/83

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	}	
WASHINGTON PUBLIC POWER SUPPLY SYSTEM, <u>ET AL.</u>		Docket No. 50-508 OL
(WPPSS Nuclear Project No. 3)		

NRC STAFF RESPONSE TO UNTIMELY PETITION TO  
INTERVENE FILED BY THE COALITION FOR SAFE POWER

I. INTRODUCTION

The Coalition for Safe Power ("CSP" or "Petitioner"), on February 22, 1983 filed a "Request for Hearing and Petition for Leave to Intervene" ("Petition"). The Staff of the Nuclear Regulatory Commission ("Staff") opposes the Petition on the ground that it does not comply with the requirements of 10 C.F.R. § 2.714 of the Commission's regulations.

II. BACKGROUND

On September 15, 1982, the Commission published in the Federal Register a notice entitled, "Washington Public Power Supply System, et al., Nuclear Project No. 3; Receipt of Application for Facility Operating License; Availability of Applicants' Environmental Report; Consideration of Issuance of Facility Operating License; and Notice of Opportunity for Hearing." 47 Fed. Reg. 40736-38 (1982). That notice established October 15, 1982 as the deadline for filing requests for a hearing and petition for leave to intervene. On February 22, 1983, CSP filed its Petition. CSP acknowledges that its Petition is late-

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filed but asserts that it has shown that it has the requisite interest to establish standing and that a balancing of the five-factor test governing its late-filed intervention petition weighs in favor of granting its Petition. Petition at 1, 9. Accordingly, CSP seeks an Order granting its Petition.

### III. DISCUSSION

#### 1. Interest and Standing

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

In any proceeding under [the] Act, for the granting, suspending, revoking, or amending of any license or construction permit . . . 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 such proceeding.

Section 2.714(a) of the Commission's Rules of Practice also provides that "[a]ny 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." Thus the pertinent inquiry under Section 189a of the Act and 10 C.F.R. § 2.714(a) of the regulations is whether Petitioner has alleged an interest which may be affected by the operating license proceeding. The Commission has held that contemporaneous judicial concepts of standing are controlling in the determination of whether the requisite interest prescribed by both Section 189a of the Atomic Energy Act and Section 2.714 of the NRC's Rules of Practice is present. Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976). There must be a showing that (1) the action

being challenged could cause "injury-in-fact" to the person seeking to intervene and that (2) such injury is arguably within the "zone of interests" protected by the Atomic Energy Act or the National Environmental Policy Act.<sup>1/</sup> Id. See Warth v. Seldin, 422 U.S. 490 (1975); Sierra Club v. Morton, 405 U.S. 727 (1972). Thus, a petitioner must "set forth with particularity" its interest in the proceeding and how that interest may be affected by the outcome of the proceeding. 10 C.F.R. § 2.714(a)(2).

a. Rules of General Applicability to Organizations

An organization may establish standing based upon an injury to itself or through members of the organization who have interests which may be affected by the outcome of the proceeding. Edlow International Co., CLI-76-6, 3 NRC 563, 572-74 (1976); Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-322, 3 NRC 328, 330 (1976).<sup>2/</sup> When an organization claims standing based on the interests of its members, at least one of its members must have standing in his or her own right, the organization must identify (by name and address) specific individual members whose interests may be affected, and the organization must demonstrate that such members have authorized the organization to represent their interests in the proceeding. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 393-97 (1979); Public Service Electric & Gas Co.

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1/ 42 U.S.C. § 4321 et seq.

2/ A petitioner must particularize a specific injury that it or its members would or might sustain should it be denied relief. The test is whether a "cognizable interest of the petitioner might be adversely affected if the proceeding has one outcome or another." Marble Hill, CLI-80-10, 11 NRC 436, 439 (1980).

(Salem Nuclear Generating Station, Units 1 and 2), ALAB-136, 6 AEC 487, 488-89 (1973). Absent express authorization groups may not represent other than their own members and individuals may not assert the interests of other persons. Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418 (1977).

Generally, the close proximity of a petitioner's residence is presumed sufficient to satisfy the interest requirements of 10 C.F.R. § 2.714. Armed Forces Radiobiology Research Institute (Cobalt-60 Storage Facility), ALAB-682, 16 NRC \_\_\_\_, slip op. at 6-7 (July 16, 1982) (hereinafter "AFRRI"); Allens Creek, 9 NRC 393, citing, Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979).<sup>3/</sup> Nevertheless, since there is no presumption that every individual who lives near the plant will consider himself potentially harmed by the outcome of a proceeding, it is important that the nature of the invasion of an individual's personal interest be identified. Allens Creek, 9 NRC at 383. Accordingly, it has been found that persons who live near the site have standing to intervene if they allege a potential for injury from operation of the facility. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), LBP-80-22, 12 NRC 191, 195-96 (1980), affirmed, ALAB-619, 12 NRC 558, 564-65 (1980).

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<sup>3/</sup> In the past, residential distances of up to 50 miles have been found to be not so great as to necessarily preclude a finding of standing in licensing proceedings. See e.g., Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 at n.4 (1977); Portland General Electric Co. (Trojan Nuclear Plant), ALAB-496, 8 NRC 308 (1978) (40 miles); North Anna, ALAB-416, 6 AEC 631, 633-34 (1973) (residency within 30-40 miles sufficient to show interest in raising safety questions).

b. Interest and Standing of Petitioner in This Proceeding

Petition asserts it has standing based, "in large part," upon its members which may be impacted by the operation of WNP-3. Petition at 2. Petitioner alleges that: (1) at least one member resides within 50 miles of the plant;<sup>4/</sup> (2) its members live, work, recreate, and travel in the "environs" of WNP-3 and the Columbia River; and (3) its members eat food-stuffs grown and produced in the vicinity of WNP-3 which would be affected by operation of the project. Petition at 2. Attached to the petition is an affidavit executed by Eugene Rosolie, Director of Petitioner organization. The affidavit attests that statements in the petition are truthful and that Mr. Rosolie is the duly authorized representative of CSP.

As noted above, an organization can establish representational standing based on the formal authorization of one of its members to file a petition on his behalf. In the instant case, however, there is no evidence of formal authorization. Rather, there is merely the identification of Mr. Duree and a statement in the petition that he formally authorized the filing of the petition. Petition at 2. There is no statement or affidavit from Mr. Duree to confirm that he is a member of CSP, that he authorizes CSP to represent his interest in this proceeding and that he has sufficient personal interest to enable his intervention in the proceeding. In the absence of such a statement or affidavit from Mr. Duree, the Petition contains an inadequate averment of facts necessary to allow an informed determination that CSP does possess a member with the requisite personal standing. See Allens Creek, supra, ALAB-535, 9 NRC

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<sup>4/</sup> The Petition identifies this member as Jim Duree, Attorney at Law, Star Route Box 582, Aberdeen, Washington.

at 393-94. Further, CSP has not established that it is a single-issue organization so that it might be reasonably inferred that, by joining the organization, the members were implicitly authorizing it to represent any personal interests which might be affected by the proceedings. Id. at 396. In the absence of clearly establishing the nature of the organization, no weight can be given to the assertion in the Petition that Mr. Duree's authorization to represent his personal interest in this proceeding can be implied by the mere fact of his membership in CSP.

With respect to the other interests identified in the Petition, the Staff notes that general assertions that a petitioner's members live and recreate near a facility or eat foodstuffs grown near the plant are not sufficiently particularized to support a finding of standing. See Public Service Co of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-397, 5 NRC 1143, 1150 (1977); Mississippi Power Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-143=30, 6 AEC 423, 425 (1973). In addition, the economic interest of a ratepayer asserted by Petitioner is not within the "zone of interests" protected by the Atomic Energy Act and does not confer standing to intervene. Pebble Springs, 4 NRC 614, Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit No. 2), ALAB-470, 7 NRC 473, 475 (1978); ALAB-582, 11 NRC 239, 242 (1980).

For the reasons stated above, CSP has not satisfied the requirement that it specifically identify and provide verification that it has at least one member who has an interest that will be affected by operation of the facility and who authorizes CSP to represent his or her interests.

2. Specific Aspects of the Subject Matter of an Operating License Proceeding

In addition to satisfying the standing and interest requirements of 10 C.F.R. § 2.714, a petitioner must "also set forth with particularity" . . . the specific aspect or aspects of the subject matter of the proceeding as to which the petitioner wishes to intervene." 10 C.F.R. § 2.714(a)(2).<sup>5/</sup>

Petitioner lists 21 "specific aspects" (labelled 1 through 21) of an operating license proceeding which it seeks to litigate. A number of the aspects, although broad in scope, fall within the findings required for the issuance of an operating license under 10 C.F.R. § 50.57 (e.g., aspects 1, 4, and 6-8).

In the opinion of the Staff, Petitioner has identified aspects which are within the scope of an operating license proceeding and are sufficient to put the parties on notice with respect to contentions it may draft. Consequently, the Staff is of the view that Petitioner has satisfied the aspects requirements of 10 C.F.R. § 2.714.

3. The Factors Governing Consideration of a Late-Filed Petition

A late intervention petitioner must address the five specified factors in 10 C.F.R. § 2.714(a) and "affirmatively demonstrate that on balance, they favor his tardy admission into the proceeding." Duke Power Co. (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-615, 12 NRC 350, 352 (1980); see Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975). These factors are:

- (i) Good cause, if any, for failure to file on time.

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<sup>5/</sup> An "aspect" is generally considered to be broader than a "contention," but, narrower than a general reference to the NRC's operating statutes. Consumers Power Co. (Midland Plants, Units 1 and 2), LBP-78-27, 8 NRC 275, 278 (1978).

- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

The Commission has emphasized that licensing boards are expected to demand compliance with the lateness requirements of 10 C.F.R. § 2.714. See Pacific Gas & Electric Co. (Diablo Canyon, Units 1 and 2), CLI-81-5, 12 NRC 361, 364 (1981). The burden is on the petitioner to demonstrate that a balancing of these five factors is in its favor.

1. Good Cause

The first factor in 10 C.F.R. § 2.714(a)(1) is whether there is good cause for the filing delay. Where no good excuse is tendered for the lateness of a petition, a petitioner's demonstration on the other factors must be particularly strong. Perkins, ALAB-431, 6 NRC 460, 462 (1977). CSP asserts that a combination of reasons exist for Petitioner filing its Petition four months late. Petition at 5. First, CSP states the non-timeliness resulted from overlooking the notice placed in the Federal Register. Id. As Petitioner acknowledges, there is a general rule regarding the sufficiency of a notice placed in the Federal Register. The Federal Register Act provides that "[a] notice of hearing or of opportunity to be heard, required or authorized to be given by an Act of Congress . . . shall be deemed to have been given to all persons residing within the States of the Union . . . when the notice is published in the Federal Register . . ." 44 U.S.C. § 1508. See also, Federal



Corp. v. Merrill, 332 U.S. 380, 384-85 (1947). The Commission's case law is fully in accord with the above-cited statutory provision and provides that "ignorance of the publication of the Federal Register notice does not constitute good cause for this belated request [to intervene]." Consolidated Edison Company (Indian Point Station, Unit No. 2), LBP-82-1, 15 NRC 37, 40 (1982); Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-292, 2 NRC 631, 647 (1975). In sum, CSP failure to see the Federal Register notice of this proceeding is not a sufficient excuse under Commission case law for the untimely filing of a petition for leave to intervene.

Second, CSP states the non-timeliness resulted from Petitioner being preoccupied with another licensing proceeding. Petition at 5. The Appeal Board has indicated that an organization's decision to participate in a number of simultaneous Commission proceedings does not excuse the organization from satisfying the Commission's Rules of Practice in each of these proceedings.<sup>6/</sup> In the instant case, the fact that CSP may have been preoccupied with another licensing proceeding is not a valid excuse for its failure to satisfy the filing deadline for its Petition.

In addition, CSP claims that it expected the Portland newspaper to print a notice of opportunity for hearing. Portland, Oregon is located hundreds of miles from the plant site which is 26 miles west of Olympia,

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<sup>6/</sup> Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 340 (1980) (fact that Intervenor's representative took on far more than they could reasonably handle did not excuse its failure to answer interrogatories in a timely fashion).

Washington. Local notices of the proceeding were placed in the following newspaper published near the site: the Tacoma News Tribune, The Daily Olympian, and The Daily Word (published in Aberdeen, Washington). There is no statutory or regulatory requirement for the Commission to publish a notice in newspapers published hundreds of miles from the plant site and CSP could have no reasonable expectation that the Commission would publish a notice of the proceeding in the Portland paper. Further, CSP claims to have relied upon Mr. Duree to notify the organization of the proper time to file a petition to intervene and states Mr. Duree never received any information regarding the docketing of the application and the opportunity for a hearing. The Staff notes that Mr. Duree's address is given as Aberdeen, Washington, and notice was published in the local paper in that city. Also, as noted above, publication in the Federal Register has been held to be sufficient notice. For all the above reasons, CSP has not show good cause for filing its Petition four months out of time. Therefore, this factor should weigh against the grant of late-filed intervention.

2. Availability of Other Means and Representation  
by Existing Parties

The second factor to be considered under § 2.714(a) is whether other means are available to protect petitioner's interest. This factor weighs in favor of the granting of the Petition because there may be no means other than participating in the NRC licensing proceeding for WNP -3 which would enable CSP to pursue its interests. Similarly, as to the fourth factor (the extent to which petitioner's interest will be represented by existing parties), there is no other party, apart from the NRC Staff, who

might directly represent the interest of CSP. However, the Appeal Board has observed that the availability of other means whereby a petitioner can protect its interest and the extent to which other parties will represent that interest are properly accorded relatively less weight than the other three factors in Section 2.714(a). South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981). In fact, it is "most difficult to envisage a situation in which [these two factors] might serve to justify granting intervention" to one who fails to make an affirmative showing on the other three factors. Id.

3. Development of Sound Record

The third factor, the extent to which petitioner can assist in developing a sound record, also weighs against CSP. Petitioner must affirmatively demonstrate that it has special expertise which would aid in the development of a sound record to prevail on this factor. See Zimmer, 13 NRC at 892-93; Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570, 576 (1980). When a petitioner addresses this factor "it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony. Vague assertions regarding petitioner's ability . . . are insufficient." Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC ---, slip op. at 10 (December 8, 1982) (citations

omitted). Such "vague assertions" are all CSP has come forward with. Petition at 7-8).<sup>7/</sup>

Petitioner has not indicated that it possesses any special expertise, that it has retained qualified experts who would aid in the development of a sound record, or that it could assist in any other manner in developing the record. Petitioner has failed totally to meet its burden with regard to this factor.

4. Delay and Broadening of Issues

Finally, the fifth factor, the extent to which petitioner's participation will broaden the issues or delay the proceeding, also weighs against CSP. The delay which can be attributed directly to the tardiness of the petition is to be taken into account in applying this factor. West Valley, CLI-75-4, 1 NRC at 276; Long Island Lighting co. (Jamesport, Units 1 and 2), ALAB-292, 2 NRC 631, 650 & n.25) (1975). At the operating license stage where a hearing is not mandatory and would not be held were the Board to deny intervention it is simply indisputable that participation by CSP, the only intervenor, will both broaden the issues and

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<sup>7/</sup> Petitioner relies on Florida Power & Light (St. Lucie Nuclear Power Plant, Unit No.2), ALAB-420, 6 NRC 8, 23 (1977) for the proposition that the third and fourth factors are not directly applicable in cases where, without intervention, there would be no hearing because the factors "appear to contemplate intervention into an ongoing proceeding." Whatever the wisdom of the decision in St. Lucie, recent Appeal Board decisions have upheld the application of these factors where a late petitioner seeks to intervene in an otherwise uncontested licensing proceedings. See e.g., Grand Gulf, ALAB-704, supra, slip op. at 9-10.

delay the proceeding because absent CPS's intervention there would be no hearing.<sup>8/</sup> In such circumstances, the admission of CSP and the related hearing that would result would require the Applicant and Staff to divert resources away from other tasks. See, Indian Point, supra, LBP-82-1, 15 NRC at 41.

In sum, the first, third and fifth factors weigh against CSP. While there may not be any other forum (second factor) or party (fourth factor) which might afford protection to CSP's interest, these factors are accorded relatively less weight than the others. On balance, the factors to be considered under 10 C.F.R. § 2.714 weigh against granting CSP late intervention.

#### 4. Discretionary Intervention

The Commission has held that, in some cases, even though a petitioner does not meet the strict judicial standing requirements, intervention should be allowed as a matter of discretion. Pebble Springs, CLI-76-27, supra, at 614. The factors favoring such intervention would be:

- (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.

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<sup>8/</sup> CSP has argued that this factor is moot since no hearing would be held if Petitioner's request for hearing is not granted. Petition at 8. The plain language of 10 C.F.R § 2.714(a) requires that each of the five factors contained therein be evaluated. See Diablo Canyon, 13 NRC at 364; Grand Gulf, ALAB-704, 16 NRC \_\_\_\_, slip op. at 9-10. Furthermore, Petitioner's argument that any delay would not affect the operation of WNP-3 should be rejected. The regulation expressly refers to delay of the proceeding, not to delay of operation of the facility. See generally Allens Creek, ALAB-671, 15 NRC 508, 511 (1982); Summer, ALAB-642, supra, 13 NRC at 886.

- (3) The possible effect of any order which may be entered in the proceeding on the petitioner's interest.

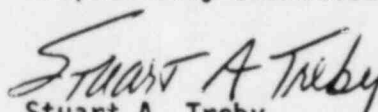
Id. at 616.

The most important of these factors should be the one concerning the petitioner's ability to make a valuable contribution to a sound record. Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-397, 5 NRC 1143 (1977). The burden of convincing the Board of petitioner's capability in this area should lie with that petitioner. Nuclear Engineering Company, Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743-44 (1978). Petitioner has only made a general assertion that it is "working with other intervenors" to identify "expert" witnesses. Such assertions do not indicate that CSP will be able to offer witnesses nor how CSP will contribute meaningfully to the technical evaluations surrounding the application for an operating license. Without the grant of this Petition, there would be no proceeding on this license application. In such a case, where a hearing is not commanded by the Atomic Energy Act or the Commission's regulations, discretionary intervention should not be allowed unless there is a particularly strong showing by a petitioner of an ability to make a substantial contribution to the record. See, Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1422 (1977). No such strong showing exists here. Therefore, CSP's request for a hearing should not be granted with regard to this license application as a matter of the Board's discretion.

IV. CONCLUSION

For the reasons set forth above, the Staff concludes that CSP's late petition should be denied.

Respectfully submitted,

  
Stuart A. Treby  
Assistant Chief Hearing Counsel

Dated at Bethesda, Maryland  
this 14th day of March, 1983

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
WASHINGTON PUBLIC POWER SUPPLY SYSTEM, ) Docket No. 50-508 0L  
ET AL. )  
(WPPSS Nuclear Project No. 3) )

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO UNTIMELY PETITION TO INTERVENE FILED BY THE COALITION FOR SAFE POWER" in the above-captioned have been served on the following by deposit in the United States, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 14th day of March, 1983:

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

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

Mr. Glenn O. Bright  
Administrative Judge  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555 \*

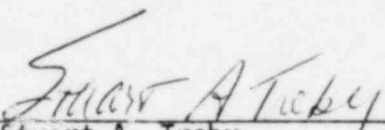
Docketing and Service Section  
Office of the Secretary  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555\*

Dr. James H. Carpenter  
Administrative Judge  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555 \*

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

Nicholas S. Reynolds, Esq.  
Sanford L. Hartman, Esq.  
Debevoise & Liberman  
1200 17th Street, N.W.  
Washington, DC 20036

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

  
Stuart A. Treby  
Assistant Chief Hearing Counsel