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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Herbert Grossman, Chairman
Glenn O. Bright
Dr. Jerry Harbour

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In the Matter of
WASHINGTON PUBLIC POWER SUPPLY SYSTEM,
et al.
(WPPSS Nuclear Project No. 1)

Docket No. 50-460-OL

ASLBP No. 82-479-06 OL

March 15, 1983

MEMORANDUM AND ORDER
(Reciting Actions Taken at Special Prehearing Conference
and Issuing Protective Order)

MEMORANDUM

On January 26 and 27, 1983, a special prehearing conference was held in the above-captioned proceeding. Present at the conference were the Coalition for Safe Power (CSP or Petitioner), the Washington Public Power Supply System (WPPSS or Applicant), and NRC Staff (Staff).

On September 10, 1982, CSP had filed a timely request for hearing and petition for leave to intervene, but had failed to disclose a name and address of at least one member with an interest in the proceeding. Instead, it attached the affidavit of Eugene Rosolie, the Director of Coalition for Safe Power which indicated that CSP had members who lived within a 50-mile radius of the nuclear facility, as close as 20 miles away, and that certain of these members had authorized CSP to file the petition to intervene on their behalf.

On October 13, 1982, the Licensing Board issued a Memorandum and Order requiring, inter alia, that the name and address of at least one member with standing to intervene must be supplied. On November 2, 1982, CSP filed an amendment to its request for hearing and petition for leave to intervene, attaching thereto an affidavit of Larry L. Caldwell, dated October 11, 1982, which indicated that he is a member of the Coalition for Safe Power, resides approximately 10 air-miles from the construction site, and authorizes CSP to represent his interest in the operating license proceeding. The date on which the affidavit was signed, October 11, 1982, was no longer a timely date for filing a petition to intervene. Under the Notice of Opportunity for Hearing issued on August 16, 1982 (47 Fed. Reg. 35567), a timely petition could be filed by September 15, 1982.

A. Positions of the Parties on Protective Order

At the prehearing conference, CSP disclosed that Mr. Caldwell had become a member of the Coalition only at the time he signed the affidavit. However, CSP claimed that it had two other members within a 50-mile radius of the plant who had authorized CSP to represent their interests in this proceeding at the time CSP filed the original petition, and that the Rosolie affidavit referred to them. Tr. 90-91. CSP submits that the Rosolie affidavit is sufficient to establish that the organization has members who reside within the geographical zone of interest. It distinguishes Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377 (1979), which required a specific identification of the member or members upon whose interests the representational standing was bottomed, from this case on the grounds that in Allens Creek mere membership of a person residing within close proximity would not have been sufficient to confer standing. There, the organization had broad, general non-nuclear objectives. Here, CSP contends that its purpose is more narrowly focused against nuclear power. CSP's Position on Prot. Order, Feb. 7, 1983, 2-4.

CSP further contends that the Caldwell affidavit as a timely amendment cures a deficiency in its previously-filed timely petition, notwithstanding that Mr. Caldwell was not a member at the time of the filing of the timely petition. CSP claims that 10 CFR §§ 2.714(a)(3)

and 2.714(b) permit amendments without prior approval of the presiding officer at any time up to 15 days prior to the holding of the special prehearing. CSP's Memo on 5-Factor Test, Feb. 11, 1983, 2-4.

If the Board does not consider the Rosolie and/or the Caldwell affidavits as satisfying the requirements of standing, CSP requests the Board to issue a protective order under which CSP could supply the names to the Board and designated representatives of other parties of the members of CSP at the time of the filing of the petition who resided in close proximity to the nuclear facility. The protective order should prohibit the dissemination of this information to the public or any other parties or representatives of parties. Tr. 91-92, 98-99; CSP's Memo on Prot. Order, supra, 6-7.

Finally, CSP urges that, even if the Board cannot accept the Rosolie and Caldwell affidavits as timely satisfying the requirements of standing and does not issue a protective order, it should accept the Caldwell affidavit and petition under the 5-factor test of 10 CFR § 2.714(a)(1) for non-timely petitions. CSP's Memo on 5-Factor Test, supra, 6-10.

Applicant relies upon Allens Creek, ALAB-535, supra, and Duke Power Co. (Oconee Nuclear Station and McGuire Nuclear Station), LBP-79-2, 9 NRC 90, 98-99 (1979), to oppose the Board's issuance of a protective

order. Applicant insists that Petitioner must allege and demonstrate that public revelation of those names will cause an identifiable harm of a specific nature in order for the Board to issue a protective order. Absent such a showing, it contends that Petitioner must disclose the identity of those individuals on the public record or decline to rely upon them. Applicant's Oppos. to Prot. Order, Feb. 7, 1983, 9. Applicant also opposes accepting the Caldwell affidavit under the 5-factor test for untimely petitions. Applicant's Memo on 5-Factor Test, Feb. 11, 1983.

Applying the guidance of Allens Creek, ALAB-535, supra, Staff opposes the Board's imposing a protective order on the parties on the ground that CSP has not provided a concrete demonstration of harassment to warrant it. Staff, however, would not object to an agreement between Petitioner, Staff and Applicant to the issuance of a protective order under which CSP could agree to disclose the names and addresses of those members upon whom it relies to the Licensing Board, Staff counsel, and counsel for the Applicant, all of whom would agree not to disclose the names. Staff would not object to the issuance of an order based upon such agreement of the parties. Staff Memo on Public Disclosure, Feb. 7, 1983. In the absence of a disclosure of those names by Board order or otherwise, Staff would oppose accepting the petition based upon the Caldwell affidavit as not satisfying the 5-factor test of 10 CFR § 2.714(a)(1). Staff Position on Late Intervention, Feb. 23, 1983.

B. Opinion on Protective Order

The Board cannot accept the Rosolie and/or Caldwell affidavits as demonstrating the requisite standing of a member of CSP to intervene in the proceeding. We agree with Petitioner that membership by a person with geographic standing to intervene, without any specific authorization to intervene in this proceeding, is sufficient to confer standing upon CSP in light of the specific goals of CSP. From the membership solicitation brochure attached to CSP's Position on Protective Order, it is clear that CSP's sole purpose is to oppose nuclear power, in general, and the construction and operation of nuclear plants in the northwest region (including the WPPSS plants), in particular. As indicated in Allens Creek, ALAB-535, supra, at 396, there is no need for a specific representational authority for organizations whose sole or primary purpose is to oppose nuclear power in general or the facility at bar in particular. In this type of situation, it can reasonably be inferred that by joining the organization the members were implicitly authorizing CSP to represent their personal interests that might be affected by the proceeding.

However, the Rosolie affidavit, by itself, isn't sufficient to demonstrate those interests. Under Allens Creek (id. at 393), the Board and parties are entitled to sufficient information to determine for themselves by independent inquiry if a basis exists for a formal

challenge to the truthfulness of the intervention petition. According to the Appeal Board, it would run counter to fundamental concepts of procedural due process for the Board to accept an affidavit of an officer of the organization that makes assertions not susceptible of verification by the other parties or the adjudicatory tribunal. Consequently, without even the names of the individual members, the organizational petition must fail.

Nor does the Caldwell affidavit, executed by someone who became a member after the due date for filing a timely petition, satisfy the timeliness requirements for filing without leave of the Board. Petitioner's argument that 10 CFR §§ 2.714(a)(3) and 2.714(b) permit an amendment such as this, to include an after-acquired member upon whom to base standing, has no foundation. Only a person who has filed a petition for leave to intervene may amend his petition (§ 2.714(a)(3)), and only a person "whose interests may be affected by a proceeding" may file a petition in the first instance (§ 2.714(a)(1)). If CSP relies upon only Mr. Caldwell as having an interest that might be affected by the proceeding and Mr. Caldwell was not a member at the time of the original filing, CSP would have no standing to file in the first place, and therefore would not be covered by the sections permitting an amendment. Furthermore, Petitioner confuses an amendment of its pleading, as permitted by § 2.714(a)(3), with a supplement to its petition in the form of the Caldwell affidavit, that is not authorized under the

regulations. An amendment relates to an existing fact that was omitted or erroneously described; it is a supplement to the petition that relates to subsequent facts. Since Mr. Caldwell was not a member at the time the petition was filed, no amendment of the petition can serve to utilize his membership for that time period. Section 2.714(b) upon which Petitioner also relies, and which does permit the filing of a supplement to the petition, relates only to a listing of contentions and does not permit the curing of a jurisdictional defect that existed at the time the original petition was filed.

Although the Rosolie and Caldwell affidavits are insufficient to demonstrate standing in this proceeding, the Board agrees with Petitioner that the circumstances are appropriate for the issuance of a protective order. We base our decision on the guidance offered in Allens Creek, ALAB-535, supra, upon which all of the parties rely. In that proceeding, the Appeal Board denied intervention to the Houston Chapter of the National Lawyers Guild, which had failed to identify any member upon whose interest the representational standing was based. Although the Guild had not asked for a protective order, it is doubtful that the Appeal Board would have granted one since it found that there was an insufficient factual foundation on which to base a finding that enforcement of the disclosure requirement would invade the right of association of Guild members. Id. at 9 NRC 400. The Appeal Board had taken official notice that the overwhelming majority of organizations

petitioning to intervene in NRC cases have manifested no reluctance to disclose names of members, and was unaware of any of those members who have paid any price because of the disclosure. Nor did the Appeal Board consider that there was any apparent reason to think that an unusual situation in that regard might obtain in the vicinity since, in two other proceedings involving Texas reactors, intervention petitions had recently been filed accompanied by affidavits which disclosed names and addresses of rank- and-file members. Id. at 399-400.

The Appeal Board stated, however, that:

Upon a determination that an adequate showing has been made that public revelation of the identity of a member of the petitioner organization might threaten rights of association, the licensing board should place a protective order upon that information. The order should provide that the information need be supplied only to the members of the Board and one or more designated representatives of the other parties to the proceeding. Additionally, it should prohibit further dissemination of the information to anyone (other than a member of a reviewing tribunal).

The facts of this case are distinguishable from Allens Creek. To begin with, the ~~general~~ situation officially noticed by the Appeal Board in Allens Creek, an absence of retaliation against critics of nuclear plant construction, is no longer valid. See, for example, Texas Utilities Generating Company (Comanche Peak Steam Electric Station, Units 1 and 2), Notice of Resumed Evidentiary Hearing dated March 4, 1983, which

refers to employees of a nuclear plant who were found by representatives of the Department of Labor to have been wrongly discharged because of "whistleblowing". Similar charges have been made by intervenors in Houston Lighting Co. (South Texas, Units 1 and 2), Docket Nos. 50-498 and 50-499, and Consumers Power Co. (Midland, Units 1 and 2), Docket Nos. 50-329 and 50-330.

More importantly, the Board finds here that CSP has sufficiently demonstrated a threat to the rights of association of its members to warrant the Board's placing a protective order upon membership information. One member of CSP, M. Terry Dana, who was a member at the time the petition was filed and lives within the requisite 50-mile radius of the plant, had authorized CSP to represent his interests in construction permit extension proceedings involving WPPSS 1 and 2 and in a construction permit proceeding involving Skagit/Hanford. According to CSP, Mr. Dana did not sponsor this intervention because of harassment in the Skagit/Hanford Nuclear Project proceeding which left him unwilling to sign any more papers for any future licensing proceedings. Tr. 44. From the transcript of that proceeding (Applicant's Supplemental Memo, Skagit/Hanford Nuclear Projects, Units 1 and 2, Tr. at 36-37), it appears that Applicant's counsel in that case questioned Mr. Dana on his familiarity with the 70 contentions filed on his behalf, whether he'd be willing to withdraw any of those contentions, and whether he realized the expense and difficulty those contentions caused. Counsel had

requested leave to take that member's deposition, but after the interview with him, had withdrawn that request.

In our view, we do not consider it necessary for the individual on whom the organizational standing is based to be conversant with, and able to defend, each and every contention raised by the organization in pursuing his interest. Litigation strategy and the technical details of the complex prosecution of a nuclear power intervention are best left to the resources of the organizational petitioner, and need not be mastered by the individual member. Cf. Allens Creek, ALAB-535, supra, at 395. It is not surprising, after the conversation with counsel for applicant in Skagit/Hanford, which made it appear that the individual member might be forced to defend the organization's contentions, that Mr. Dana was not willing to sign papers for future licensing proceedings, including the instant one. Tr. 44.

Whether or not the Applicant in this proceeding participated in that conversation is not relevant to the matter of the protective order. It is sufficient that a demonstration has been made that the rights of association of a member of an intervenor group in this area have been threatened in the form of a threat of compulsory legal process to defend contentions. Furthermore, Applicant in this proceeding has contributed to the climate of apprehension among members of the intervenor groups in this area by contacting that same member of the intervenor group in

Skagit/Hanford Nuclear Project because of his sponsorship of an intervention against WPPSS, and raised similar concerns in his mind. According to the affidavit of the WPPSS representative, he called Mr. Dana with regard to CSP's petition in construction permit extension proceedings involving WNP-1 and 2; attempted to solicit his views after being told that the member would prefer not to talk with him; noted that a hearing would be time consuming and costly; and offered that, even if the member "felt uncomfortable in speaking with" the WPPSS representative, the WPPSS representative "would have an opportunity to hear his concerns if a hearing were granted." Applicant's Mot. to Suppl. Memo, Sorenson Affid., 2.

Whether intended or not, Mr. Dana (and perhaps other current or prospective members) was put on notice (unwarranted in our opinion) that a sponsorship of this intervention could result in his being compelled to attend the hearing and support his concerns (i.e., CSP's contentions) about the issues raised.

Furthermore, CSP indicates that Mr. Dana's employer was informed of his role in sponsoring the Skagit/Hanford Nuclear Project intervention, severely reprimanded him for it, counselled him not to repeat his acts, and generally put him on notice that such behavior threatened his very employment. CSP's Position on Prot. Order, supra, at 5. Petitioner points out that employment concerns for intervenors in this Hanford area

(and the Federal Reservation at Savannah River, South Carolina) are unique in that all employment is either for, or dependent on, the nuclear industry. A person who loses his job because of association with intervenor groups is not likely to find future employment in the area. Id. at 6.

We do not consider that an evidentiary hearing is necessary to validate Petitioner's concerns with regard to the effects of a public exposure of the names of individual petitioners. We find that the statements by the representatives of Skagit/Hanford Nuclear Project and WPPSS corroborate Petitioner's position that the rights of association of intervenor group members have already been threatened in this area. We also take official notice that the employment situation in the area is dependent on the nuclear industry, as described by Petitioner, and would further threaten those rights of association.

Furthermore, while we are wary of setting a precedent for other proceedings, we see little threat to Applicant's interests from issuing a carefully worded protective order that would enable Applicant to verify the existence at the time of the filing of the petition of a member of the petitioning organization with geographic standing, whose membership authorized the filing of the petition. We see no detriment to Applicant's interests by not having the identity of the individual member publicly disclosed.

C. Briefing Schedules Set at Conference

At the prehearing conference, the Board requested a further briefing by the parties on the question of issuing a protective order. The parties were given 10 days from the conclusion of the prehearing conference to simultaneously submit their memoranda. They each timely filed their memoranda on February 7, 1983. On February 17, 1983, Applicant also filed a motion for leave to supplement its memorandum, with the attached affidavit of an employee of WPPSS concerning his contact with a member of Petitioner organization and a few pages of the Skagit/Hanford transcript, which were alluded to, above. In response thereto, CSP sent the Board a letter dated February 22, 1983, concerning the Skagit/Hanford transcript. The Board has considered the Board-requested memoranda and the supplemental submittals in issuing this memorandum and order.

The Board also requested that the parties brief the question of whether the CSP petition with the accompanying Caldwell affidavit meets the five-factor balancing test of § 2.714(a)(1). Petitioner was given 15 days after the conclusion of the prehearing conference to submit its position on the five-factor test. Staff and Applicant were given 7 days after service (12 days) to respond to CSP's submittal. Tr. 123-124. The parties met their respective time schedules. The Board will not rule on that issue at this juncture. It will first await the results of

its issuance of the protective order before deciding whether it is desirable to consider the petition as an untimely filing.

The remainder of the prehearing conference was taken up by a discussion of the specific contentions raised by CSP. The Board will not rule on these contentions until after it determines whether CSP has standing to intervene.

Finally, the Board requested that the parties submit their positions on the posture of the case and further scheduling, taking into account Applicant's intention of delaying construction 2 to 5 years, including their positions on a re-noticing of the opportunity for hearing. The parties were given 30 days, or until February 28, 1983, to submit their respective positions. Tr. 225-232. The parties have timely complied. The Board will take into account the submittals in its subsequent issuances after the matters involving the protective order and standing have been resolved.

ORDER

For all of the foregoing reasons and based upon a consideration of the entire record in this matter, it is, this 15th day of March, 1983,

ORDERED

- (1) That the briefing schedules established at the prehearing conference are confirmed and all of the parties' submittals pursuant thereto are accepted as timely filed;
- (2) That Applicant's motion for leave to supplement memorandum, dated February 17, 1983, is granted. The materials submitted with that motion to supplement and Petitioner's letter of February 22, 1983 responding to those materials are accepted as filed;
- (3) That, with regard to the protective order,
 - (a) Petitioner will disclose to the Board and lead counsel for the Applicant and NRC the name and address of at least one of those individuals upon whom it based its representational standing, to whom Petitioner's requests for hearing and petition for leave to intervene referred but did not identify. Counsel for the Applicant and Staff may each in his/her sole discretion disclose such information to two other individuals: in the case of Applicant's counsel, individuals associated in any capacity with his law firm (but in no event anyone employed by Applicant itself); and in the case of NRC counsel, only individuals in OELD;

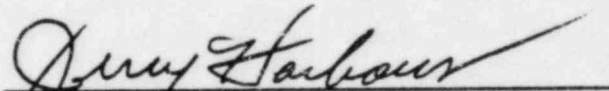
(b) When disclosing the name(s) and address(es) of the individual(s) referred in paragraph "(3)(a)", above, Petitioner will provide evidence to the satisfaction of Applicant's and Staff's counsel that at least one of the disclosed individuals was, as of September 15, 1982, a member of Petitioner organization, sufficient to satisfy Applicant's and Staff's counsel. If Petitioner is unable to satisfy Applicant's counsel or Staff's counsel, Petitioner may request that the Board hold a conference call with all the parties to resolve the matter. In lieu of providing sufficient evidence to establish the individual's membership at that time in Petitioner organization, Petitioner may have the option either of (i) providing affidavits from at least one such individual affirming his/her membership in Petitioner organization of as September 15, 1982, or (ii) agreeing to allow Applicant's counsel to contact said member or members to determine the fact of membership. In any such contact, Applicant's counsel or representative will be restricted to questioning the member only on the fact of membership at the appropriate date, and whether said members understood that Petitioner organization was devoted towards opposing nuclear power, especially in the northwest. In no event is Applicant's counsel to discuss the contentions raised,

any hardships on Applicant arising from the litigation, or the possibility that the member would in any way be required to further participate in the proceeding;

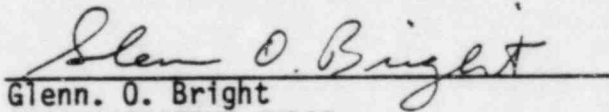
- (c) Information subject to this protective order shall not be disclosed to any other individual or organization, except upon prior approval of the Board;
 - (d) If this information is disclosed to any person other than in the manner authorized by this protective order, the person responsible for the disclosure must immediately bring all pertinent facts relating to such disclosure to the attention of Petitioner and the presiding officer, and make every effort to prevent further disclosure; and
- (4) That the parties shall have 10 days from the date of service of this Order to object to, or request modifications of, this Order. If any objection or request for modifications is received, the Board will attempt to resolve the matters through conference call. If no objections or requests for modifications are filed, Petitioner shall have 16 days from the date of service of this Order to comply with its terms and conditions, or Petitioner shall be foreclosed from relying on any individuals referred to in its request for hearing and

petition for leave to intervene and not identified on the public record to establish its representational standing to participate in this proceedings.

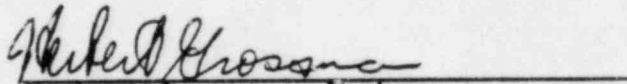
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