

September 27, 1982

'82 SEP 27 P4:38

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY
AND LICENSING BOARD

In the Matter of)	
)	
WASHINGTON PUBLIC POWER)	Docket No. 50-460-OL
SUPPLY SYSTEM)	
)	
(WPPSS Nuclear Project No. 1))	

Applicant's Answer In Opposition
To Request For Hearing And
Petition For Leave To Intervene

I. Introduction

On August 16, 1982 Notice was given that the Nuclear Regulatory Commission ("NRC") had received an application from the Washington Public Power Supply System ("Applicant") to operate the Supply System's Nuclear Project No. 1 ("WNP-1"). The Notice further provided that requests for a hearing and petitions for leave to intervene may be filed by any person whose interest may be affected by this proceeding. Such requests were to be filed by September 15, 1982. 47 Fed. Reg. 35567 (1982).

On September 10, 1982 the Coalition for Safe Power ("petitioner") filed a "Request for Hearing and Petition for Leave to Intervene" ("petition to intervene"). It

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recited its purported interests and the alleged effect the proposed operation of WNP-1 would have on those interests. Petitioner also recited that it intends to file contentions on approximately 22 issues which include broad health and safety issues involving Applicant's ability to operate WNP-1. Petitioner thereupon concluded that it had established "standing of right" under the Atomic Energy Act and that it was entitled to the hearing it requested in its petition.

II. Argument

Applicant opposes the "Request for Hearing and Petition for Leave to Intervene." However, before presenting legal argument, Applicant wishes to urge this Atomic Safety and Licensing Board ("Board") in ruling on the petition to intervene to be mindful of the admonition of the Appeal Board in Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Power Station), ALAB-305, 3 NRC 8 (1976). The Appeal Board observed in Zimmer that "[i]n an operating license proceeding, unlike a construction permit proceeding, a hearing is not mandatory", and cautioned that "a board should take equal care in [OL] cases to assure itself that potential intervenors do have a real stake [i.e., interest] in the proceeding." 3 NRC at 12.¹ Applicant submits that such admonition is especially

¹ Accord, Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-183, 7 AEC 222, 226, n. 10 (1974).

timely in a situation such as this, where the Coalition for Safe Power is the only person or organization seeking a hearing.

As discussed below, Applicant believes that petitioner has failed to establish a clear legal interest in the proceeding upon which standing can be conferred, as required by 10 C.F.R. §2.714. It has also failed to demonstrate how any interest it alleges will be affected by the outcome of the proceeding, again as mandated by Section 2.714. Nor is petitioner entitled to intervention as a matter of discretion. Therefore, its petition to intervene should be denied.

A. The Petitioner Has Failed to Establish a Clear Legal Interest in this Proceeding

The teachings of the Commission in Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976), and the Appeal Board's decisions² in the wake of Pebble Springs, establish the test for determining whether an individual may be permitted to intervene as a matter of right in a proceeding involving issuance of a construction permit or operating license. Such an intervenor must assert an "interest

² E.g., Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit No. 2), ALAB-470, 7 NRC 473 (1978); Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418 (1977); Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-397, 5 NRC 1143 (1977).

which may be affected" by the proceeding. Applying contemporaneous judicial concepts of standing,³ the Commission in Pebble Springs interpreted this "interest" requirement as mandating the allegation of both (1) some injury in fact that has occurred or will probably result from the action involved, and (2) an interest "arguably within the zone of interests" to be protected or regulated by the statute sought to be invoked.

It is well established that for an organization to intervene as the representative of its members, such organization must establish that at least one of its members has standing on his own right. See, e.g., Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-322, 3 NRC 328 (1978); see also Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 40 (1976); and Warth v. Seldin, 422 U.S. 490 (1975). The specific members must be identified, how their interests may be affected must be shown, and the members' authorization to the organization to intervene must be established. Edlow International Company, CLI-76-6, 3 NRC 563 (1976). Allied General Nuclear Service (Barnwell Fuel and Recovery Station),

³ Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 439 (1980); see Warth v. Seldin, 422 U.S. 490 (1975); Sierra Club v. Morton, 405 U.S. 727 (1972); Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970).

LPB-76-12, 3 NRC 277 (1976), aff'd, ALAB-328, 3 NRC 420 (1976). Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2) LPB-79-1, 9 NRC 73, 77 (1979). Following this mandate, the cases are clear that the individual member from whom organizational standing is derived must, in some manner (e.g., affidavit), state his concerns and interest in detail sufficient to establish individual standing.⁴ Thus, the question of petitioner's standing must be resolved on the demonstration of interest by the individuals whom the petitioner asserts are its members. Sierra Club v. Morton, supra, 405 U.S. at 470 ("a party seeking review must allege facts showing that he is himself . . . affected. . . .").

When viewed against this legal framework, it is clear on the basis of the pleading filed by petitioner that it has failed to make the requisite showing to establish a legal interest in this proceeding sufficient to confer upon it standing as a matter of right. Petitioner attempts to base its "interest" on the fact that (1) it "has members residing throughout Oregon and Washington and

⁴ Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-536, 9 NRC 402, 404 (1979); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 396-97 (1979); Duke Power Company (Catawba Nuclear Station, Units 1 and 2), LBP-73-28, 6 AEC 666, 680 (1973), aff'd, ALAB-150, 5 AEC 811 (1973); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-77-11, 5 NRC 481, 482-483 (1977).

at least one who is within the fifty mile radius of the plant site"⁵ and who authorized the Coalition to file the petition to intervene on their (or his) behalf and (2) its members work, live, recreate and travel near WNP-1 and "eat foodstuffs, both [sic] dairy, produce and meat, grown and produced in the vicinity potentially impacted upon by the operation of the project."⁶ Neither of these allegations provide an adequate basis to find that petitioner has a clear legal interest in this proceeding sufficient to vest it with standing to participate.

First, an allegation that the petitioner has members living throughout Oregon and Washington does not in itself confer standing on that organization. Such a broad area is not clearly within the geographical zone which might be affected by operation of WNP-1.⁷ It is also beyond the distance recognized by the NRC in the past to be sufficiently close to vest an interest (if otherwise well pled) in the proceeding.⁸ As to these members, "prima facie,

⁵ Petition to intervene at ¶5.

⁶ Id.

⁷ Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-125, 6 AEC 371, 372 n. 6 (1973).

⁸ E.g., Portland General Electric Co. (Trojan Nuclear Plant), ALAB-496, 8 NRC 308 (1978) (40 miles); River Bend, supra, 7 AEC 222 (1974) (25 miles); Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-146, 6 AEC 631 (1973) (16 miles); Northern States Power Co. (Prairie Island Nuclear

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there would appear to be no reasonable chance of [their] being at all adversely affected by either normal operations or a credible accident." River Bend, supra, 7 AEC at 226. Accordingly, petitioner is not vested with standing on the basis of members living throughout Washington and Oregon.

Perhaps recognizing this fact, petitioner goes on to allege that at least one of its members is living within a fifty miles radius of WNP-1 and that they (or he) authorized the petitioner to file the petition to intervene on their (or his) behalf. In support of this allegation, petitioner submitted an affidavit executed by its director (not these individuals) averring such "fact". However, this allegation (even if supported by an affidavit) is insufficient basis to conclude that petitioner has established its standing to participate in this proceeding.

Specifically, the petitioner has failed to identify its members and the personal interest of each that might be adversely affected by the outcome of this proceeding. Instead, it has submitted a general affidavit by its director that at least one unnamed member has authorized the petitioner to file the instant petition on their

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Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188
(1973) (40 miles).

behalf. Petitioner has failed to submit an affidavit from this member as it is required to do. Without the basic information that such an affidavit should contain it is impossible to verify whether the petitioner might possess representational standing to intervene in this proceeding. Consequently, the petitioner has failed to make the requisite showing to enable it to intervene in a representative capacity on behalf of these unnamed members.

The second aspect of petitioner's claim to participate is that it has standing as a matter of right in this proceeding because its members work, live, recreate and travel near WNP-1 and eat foodstuffs grown in the vicinity potentially impacted upon by the operation of the project. Again, this claim is insufficient to establish standing. Recreational activities in an area may provide the legal interest needed to confer standing only if the area is in close proximity to a plant site and the recreational activities are stated with specificity and are substantial in nature. Black Fox Station, supra, 5 NRC at 1150; Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 425 (1973). Evaluating the petition to intervene against this guidance, it is clear that petitioner has failed to demonstrate substantial recreational use of the area around the site. Vague and general assertions relating to living and

recreating in the vicinity of the WNP-1 site are precisely the types of claims which both the Appeal Board and the Commission have recognized are insufficient to establish standing.

Petitioner's other general assertion in this regard is that its members consume food grown or produced in areas that would be impacted by plant operations. This also is too speculative and lacking in specificity to establish legal interest to support the petition to intervene. To confer standing on a petitioner residing outside the relevant geographical zone based on an assertion that some food consumed by the petitioner (or its members) may have been grown near the site would emasculate judicial concepts of standing as well as the interest requirements of the Atomic Energy Act and the Commission's Rules of Practice. The logical extension of such a proposition would be that an individual living in Washington, D.C. who consumed California oranges could be awarded standing in a proceeding relating to a nuclear facility in California. Certainly Congress did not intend and has not sanctioned such an interpretation of the Atomic Energy Act, and the Commission and the courts certainly have not judicially construed the Act in such manner.

At bottom, petitioner has utterly failed to establish a clear interest in this proceeding. On the one hand it alleges a legal interest in the proceeding by virtue of its members. But, contrary to well-established law, it has not provided through the affidavits of those members the basic information necessary for the Board to determine whether representational standing is present. Consequently, petitioner's "Request for a Hearing and Leave to Intervene" should be denied.

B. The Petitioner Has Failed to Establish How Its Interests May be Affected by the Outcome of This Proceeding

Section 2.714(a)(2) requires that the petitioner seeking intervenor status must set forth how its interest may be affected by the outcome of the proceeding in which petitioner wishes to intervene. In the case of an organization seeking standing through one of its members, the organization must show how the interest of that member will be affected by the outcome of the proceeding. Allens Creek, supra, 9 NRC at 393. Because petitioner has failed to satisfy this requirement, its request to intervene should be denied.

First, petitioner has failed to show how the interests of its unnamed members allegedly living within fifty miles of the plant (and who purportedly authorized the filing of the petition on their behalf) may be affected by

the outcome of this proceeding. It is clear that Section 139 of the Atomic Energy Act "does not confer the automatic right of intervention on anyone." BPI v. Atomic Energy Commission, 502 F.2d 424, 428 (D.C. Cir. 1974). It is also clear that mere proximity of residence to a power reactor alone is not sufficient to confer standing. The petition must also explicitly identify "the nature of the invasion of [their] personal interest which might flow from the proposed licensing action." Allens Creek, supra, 9 NRC at 393. Accord, North Anna Nuclear Power Station, supra, 9 NRC at 404. Petitioner has failed to do so.

To the extent that petitioner relies on the affidavit submitted by its director to meet this requirement, such reliance is misplaced. The affidavit is not executed by the members whose interests are invoked to establish the "right" of petitioner to participate in this proceeding. Moreover, conspicuous by their absence are any statements in the affidavit that particularize any interest of these undisclosed members which may be affected by this proceeding. Nor does the affidavit give any indication that these members understand the proceeding or consider themselves potentially aggrieved by its outcome. See Allens Creek, supra, 9 NRC at 393.

Second, petitioner has not demonstrated how the interests of its members living throughout Washington and Oregon will be affected by the outcome of the proceeding. As discussed above, these members live well beyond the geographical area generally recognized as being affected by operation of WNP-1⁹ and thus by definition have no interest which may be affected by this proceeding. Petitioner has provided no factual basis for reaching any contrary conclusion or for abandoning what have become well-established rules (set forth earlier) used to evaluate whether Section 2.714(a)(2) is satisfied.¹⁰

⁹ See note 8, supra, and accompanying text.

¹⁰ Petitioner asserts that several adverse economic conditions may result if WNP-1 is licensed to operate and that they will affect the interests of its members. Petitioner to intervene at ¶6. While petitioner may characterize these economic matters as "affecting the interests" of its members, the "interests" affected are nevertheless economic ones which are insufficient to confer standing upon petitioner. Specifically, the petition claims "a nuclear accident at the project may affect the economy of the region." Id. This allegation is precisely the type of general and vague claim which is not sufficient to establish standing, Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), ALAB-333, 3 NRC 804, 806 (1976), aff'd, CLI-76-27, 4 NRC 610 (1976), and certainly cannot serve as a basis for representational standing of an intervenor that has not clearly demonstrated that some of its members reside within 50 miles of the plant.

Second, petitioner claims at ¶6 of its pleading that "insurance would not adequately cover losses sustained by the members of the Coalition in case of an accident." This apparently is a challenge to the liability provisions of the Price-Anderson Act, 42 U.S.C. §2210, and the Commission's regulations implementing that Act.

(footnote continued)

Indeed, given the total absence of any identified interests affected by this proceeding, it appears that petitioner is not in fact attempting to represent specific interests of identified members genuinely concerned with the operation of WNP-1. Instead, it seems that the

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This tack also cannot confer standing on the petitioner. In Florida Power & Light Co. (Turkey Point Units Nos. 3 and 4), Memorandum and Order, 4 AEC 787 (1972), the Commission held that a licensing proceeding is not the proper forum for an attack on the Price-Anderson Act. Further, a challenge to the Commission's Price-Anderson regulations is proscribed in NRC adjudicatory proceedings by 10 CFR §2.758. In any event, the Supreme Court affirmed the constitutionality and reasonableness of that Act on June 26, 1978. Duke Power Co. v. CESC, 438 U.S. 59 (1978). Thus, petitioner's challenge is unsupported and invalid as a matter of law, and can lend no support to its attempt to demonstrate "interest" in this proceeding.

Lastly, ¶6 of the petition states that "the proposed plants will place and [sic] excessive economic burden on members who are ratepayers of permittee utilities." However, it is well established that the economic interest of a ratepayer is not sufficient to allow standing to intervene as a matter of right since concern about rates is not within the scope of interests sought to be protected by the Atomic Energy Act. Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-424, 6 NRC 122, 128 (1977); Watts Bar Nuclear Plant, supra, 5 NRC at 1420-21 (1977); Detroit Edison Co. (Greenwood Energy Center, Units 2 and 3), ALAB-376, 5 NRC 426, 428 (1977); Public Service Co. of Oklahoma (Black Fox Nuclear Power Station, Units 1 and 2), LBP-77-17, 5 NRC 657, 659 (1977). Nor is such interest within the zone of interests protected by the National Environmental Policy Act. Watts Bar, supra; Pebble Springs, supra, 3 NRC at 806 (1976). Thus, at bottom, whether characterized as an "interest" or as an "affect on an interest", these economic claims do not provide any basis for concluding that petitioner may participate in this proceeding as a matter of right.

petitioner is intent on pursuing its own theoretical interests and value preferences with regard to nuclear energy. Consequently, the petition should be denied for failure to demonstrate that petitioner's interests may be affected by the outcome of this proceeding.

C. Petitioner Should Not be Granted Discretionary Intervention

Petitioner attempts to establish standing to intervene as a matter of right and does not request discretionary intervention. Nevertheless, the Board may consider whether, as a matter of discretion, petitioner should be admitted as a party. In Pebble Springs, supra, the Commission concluded that in circumstances where standing to intervene as a matter of right is lacking, participation in the proceeding may nevertheless be allowed as a matter of discretion. 4 NRC at 614-17. The Commission suggested that such discretionary intervention might be granted "where petitioners show significant ability to contribute on substantial issues of law or fact which will not otherwise be properly raised or presented, set forth these matters with suitable specificity to allow evaluation, and demonstrate their importance and immediacy, justifying the time necessary to consider them" (emphasis added). 4 NRC at 617. It is clear that the most important factor to be considered is the extent of the contribution which might be expected of petitioner. Nuclear Engineering Co., Inc.

(Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743-44 (1978); Watts Bar, supra, 5 NRC at 1422; Black Fox, supra, 5 NRC at 1145; Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-363, 4 NRC 631 (1976). Other factors to be considered are those set forth in 10 CFR §§2.714(a) and (d). Pebble Springs, supra, 4 NRC at 616.

Based on the matters raised in the petition to intervene, there is absolutely no need for a hearing to be conducted on the WNP-1 operating license application. Petitioner has raised no issues of substance which require resolution in a hearing, but rather has set forth unparticularized statements of concern. Petitioner claims, for example, that "there exists no reasonable assurance", that "construction will have been in accordance with the rules and regulations of the Commission" or "that operation of the project will not endanger the public health and safety". Petition to intervene at ¶8. These are not the types of specific, well-documented contentions which warrant a hearing.

Further, petitioner has demonstrated no unique, special, or even general expertise which would contribute to the development of a sound evidentiary record on substantial issues. As noted, the Commission in Pebble Springs, supra, 4 NRC at 617, contemplated a showing of

"significant ability to contribute on substantial issues". Petitioner asserts in this regard that it has been granted "full party status" in five proceedings before the Commission, including the application for a construction permit for Pebble Springs, Units 1 and 2 and two license amendments for the Trojan Nuclear Power Plant.¹¹ Mere participation in a proceeding, of course, does not establish that the participant has contributed constructively to the development of a sound evidentiary record on substantial issues. Nor has petitioner cited any significant contributions it actually made to developing the record in these five proceedings. In short, there is no basis to conclude that this petitioner demonstrates such special expertise that on these grounds alone it should be admitted to this proceeding.¹²

¹¹ Petition to intervene at ¶3.

¹² petitioner is currently involved in the Skagit/Hanford Nuclear Power Project hearing and is the sponsor of approximately seven contentions in that proceeding. In addition, the petitioner has requested that hearings be conducted at NRC regarding two construction permit amendments sought by the Supply System. March 18, 1982 "Request for Hearing," Docket No. 50-460 (WNP-1) and February 22, 1982 "Request for Hearing," Docket No. 50-397 (WNP-2). Under these circumstances, the teachings of the Appeal Board in Pennsylvania Power and Light Company, et al. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 339 (1980), raise the serious question of whether the petitioner would have the resources to contribute meaningfully to the record in the instant proceeding.

As to the other factors specified in 10 CFR §§2.714(a) and (d) for consideration in evaluating permissive intervention, none weighs in favor of granting the instant petition. As noted, there is absolutely no indication based upon the superficial pleading filed by petitioner that its participation may reasonably be expected to assist in developing a sound record. In addition, petitioner's stated interest in the proceeding is too remote to weigh in favor of granting permissive intervention, fails to establish the necessary "injury in fact," and is simply not within the "zone of interests" protected by NEPA and the Atomic Energy Act. Thus, petitioner has no legal interest in the proceeding, and any order which may be entered in the proceeding would have no direct cognizable effect on petitioner.

On the other hand, the concerns raised by petitioner would normally be evaluated by the NRC Staff during the course of its review of any application, including the WNP-1 application. The NRC Staff represents the general public in NRC proceedings and reviews, and will certainly represent the petitioner and explore its general concerns in the performance of its overall review of the WNP-1 application. Consequently, to the extent that any concern may exist as to the operation of WNP-1, those concerns will not go unaddressed.

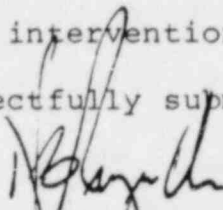
Most important of the factors to evaluate in the context of discretionary intervention is, in the Applicant's view, the compelling fact that petitioner's participation will significantly and inappropriately broaden and delay this proceeding. Because the instant petition to intervene is apparently the only one filed in response to the NRC's notice of opportunity for hearing, this operating license application would be uncontested and, as such, not involve a hearing if petitioner is denied intervention. In these circumstances, and mindful of the teachings of the Appeal Board in Zimmer, supra, this Board convened to rule on the instant petition to intervene must take the utmost care to assure that the petitioner has a true and substantial stake in the proceeding.

The instant petition utterly fails to establish that petitioner has a stake in the proceeding. The facts revealed by the petition clearly indicate that these failures are not a matter of draftsmanship, but of legal deficiencies in the petition. Both proximity and expertise in the technical subject are obviously lacking. Accordingly, the Board should not subject the Applicant to a protracted hearing at the sole instance of the petitioner. Permissive intervention should not be granted to the petitioner.

III. Conclusion

In view of the foregoing, the Board should deny the petition to intervene as a matter of right, and also should refuse to grant permissive intervention.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicant's Answer In Opposition To Request For Hearing And Petition For Leave To Intervene" in the above-captioned matter were served upon the following persons by deposit in the United States mail, first class, postage prepaid this 27th day of September, 1982:

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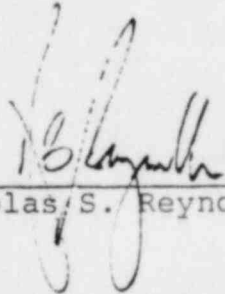
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