

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Atomic Safety and Licensing Board

Before Administrative Judges:
Morton B. Margulies, Chairman
Glenn O. Bright
Dr. James H. Carpenter

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In the Matter of

WASHINGTON PUBLIC POWER SUPPLY SYSTEM,
ET AL.

(WPPSS, Nuclear Project No. 3)

Docket No. 50-508

ASLBP No. 83-486-01 OL

April 21, 1983

MEMORANDUM AND ORDER
(Ruling on Petition For Leave To Intervene)

Development of the Proceeding

The Nuclear Regulatory Commission published in the Federal Register of September 15, 1982, a notice that it had received an application from Washington Public Power Supply System (WPPSS) to operate a pressurized water nuclear reactor located approximately three miles south of Satsop, Washington in Grays Harbor County. It directed that requests for a hearing and petitions for leave to intervene in the proceeding be filed by October 15, 1982.

On February 25, 1983, a request for a hearing and petition for leave to intervene was received from Coalition for Safe Power (Coalition), of Portland, Oregon, a non-profit citizens organization, founded in 1969 to work against nuclear power. It claims the requisite interest to establish standing and that a balancing of factors required

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by 10 CFR 2.714 to permit a late filing weigh in favor of granting the petition. It seeks an order granting the request for hearing and petition for leave to intervene. An affidavit was submitted by the director of Coalition verifying the petition.

Applicant WPPSS, by an answer dated March 9, 1983, asserts that petitioner has failed to establish a clear legal interest upon which standing in the proceeding can be conferred as required by 10 CFR 2.714; that the interests it has raised do not satisfy the requirements of the cited section of the regulations; and that Coalition has failed to demonstrate, upon a balancing of the five factors set forth in Section 2.714(a)(1), it is entitled to intervention in the proceeding. It further claims discretionary intervention is unwarranted and therefore the petition should be denied and the proceeding dismissed.

In a response filed March 14, 1983, Nuclear Regulatory Commission Staff (Staff) takes the position Coalition has not satisfied the interest requirement to give it standing; that petitioner has identified aspects which are within the scope of an operating license proceeding which are sufficient to put the parties on notice with respect to contentions it may draft, thereby satisfying the aspects requirement of 10 CFR 2.714, and that petitioner has not satisfied the requirements of 2.714(a)(1) by affirmatively demonstrating that a balancing of the five specified factors favor a tardy admission to the proceeding. Staff further asserts petitioner has not made out a case for discretionary intervention and for the foregoing reasons the late filed petition should be denied.

The matter was assigned to us for disposition.

Interest and Standing

Basic legal principles governing interest and standing requirements for intervention relied upon by the Licensing Board in deciding the issues follow.

- (1) The nature of the petitioner's right under the Act to be made a party to the proceeding;
- (2) The nature and extent of the petitioner's property, financial, or other interest in the proceeding;
- (3) The possible effect of any order which may be entered in the proceeding on the petitioner's interest.

These considerations require a showing that the action being challenged could cause injury in fact to the petitioner, and that such injury is arguably within the zone of interest, protected by the Atomic Energy Act or the National Environmental Policy Act. Worth v. Seldin, 422 U.S. 490 (1975); Sierra Club v. Morton, 405 U.S. 727 (1972).

Close geographical proximity of a petitioner's residence to the facility standing alone is sufficient to satisfy the interest requirements of 10 CFR 2.714. Residence within 30 to 40 miles of the site have been held sufficient to show interest. Virginia Electric & Power Co. (North Anna Power Station, Units 1 and 2), ALAB-146, 6 AEC 631, 633-34 (1973); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 190, 193, aff'd., CLI-73-12, 6 AEC 241 (1973), reconsid. den. ALAB-110, 6 AEC 247.

An organization can gain standing as the representative of a member or members of the organization who have interests which may be affected by the outcome of the proceeding. Public Service Co. of Indiana

(Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-322, 3 NRC 328, 330 (1976). Where an organization's entitlement to intervene is wholly dependent on the personal standing of its members, at least one of those members must be identified specifically. Representational authorization of an organization's members may be presumed where it appeared that the sole or primary purpose of the petitioner organization was to oppose nuclear power in general or the subject facility. Where the organization was not formed for the foregoing purpose, nor is there anything in its articulated objectives which might lead one to conclude that acquiring membership in the organization authorized it to represent whatever interest the person might have with regard to a nuclear power plant, there must be a demonstration that the member has authorized the organization to represent the individual's interests in the proceeding. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 393, 394, 396 and 397 (1979).

The petition filed by Coalition is supported by an affidavit of its director stating that he is the duly authorized representative of the organization, that the petition was prepared under his supervision and direction and to the best of his knowledge and belief the facts contained are true and correct. No opposing affidavits were filed.

As relevant, the verified petition describes Coalition as a non-profit citizens' organization, founded in 1969 to work against nuclear power. Its efforts include research and education. Petitioner has represented its members before this Commission as well as state agencies on questions of nuclear power safety and licensing.

The petition names one member who resides approximately 25 miles from the site. He is identified as Jim Duree, Attorney at Law, Star Route Box 582, Aberdeen, Washington. It represents that the member formally authorized the filing of the petition and did so implicitly by the mere fact of his membership in the Coalition.

Petitioner has established under existing law the standing of Coalition to intervene in the proceeding as the representative of its members who have interests which may be affected by the outcome of the proceeding. Allens Creek, supra. Representative authorization of an organization requires the identification of a member and a statement of the person's interest, with sufficient specificity so that these matters can be independently verified. That has been done here. The member is identified by name, address and occupation. The question of the member's interest is satisfied by the statement that he resides within some 25 miles of the plant. A residence within 30 miles of a site has been held to establish interest under the requirements of 10 CFR 2.714.

The necessary information has been provided with adequate specificity that it can be independently verified by any participant. The fact that the information was not supplied by an affidavit of the member but came from the director of the organization does not render it invalid. Membership in an organization involves 2 parties, the member and the organization in which membership is obtained. Each is competent to provide evidence on the matter of the membership. In this instance it came from the organization and is legally sufficient as it pertains to the issue. An organization attesting to who its member is and his

place of residence provides no less verifiable information than if provided by the member.

It is quite clear from the petition that Coalition's primary purpose is to oppose nuclear power as it has been since 1969. Its statement of its activities should lead one acquiring membership in the organization to conclude that in so doing the person was authorizing Coalition to represent whatever interest the member might have with regard to a nuclear power plant. In this instance representative authorization by Coalition can be presumed by the fact of Jim Duree's membership in the organization whose primary purpose is to oppose nuclear power.

Assuming arguendo that Petitioner has not made out a case for representational authorization presumed from membership, it was satisfactorily established through the affidavit of Coalition's president stating that Jim Duree formally authorized the filing of the petition. Again there are 2 parties to the agreement, one authorizing the other to take action. Although we do not have the affidavit from the one authorizing the filing of the petition, we do have that of the party that was to take the action. The evidence of Coalition who was authorized to make the filing is of no lesser probity than that of its member and can be verified.

We find the necessary showing has been made by Petitioner to establish interest and standing necessary to intervene in the proceeding as a representative of its members, in accordance with 10 CFR 2.714.

It is unclear whether Coalition seeks representational standing for members other than Jim Duree, on the bases of its statement that it "has

members residing throughout Oregon and Washington" and that they "live, work, recreate, and travel in the environs of WNP-3 and eat foodstuffs grown and produced in the vicinity potentially impacted upon by operation of the project." Should it be the case that it does, the matters are not set forth with sufficient specificity that would allow their evaluation on the issue of standing. Therefore, it cannot be found that they support a finding of standing. See Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-397, 5 NRC 1143, 1150 (1977). Because standing for Coalition has already been established upon the basis of the Duree membership this finding does not alter Coalition's right to participate.

Specific Aspects

Section 2.714(a)(2) of the regulations also requires a petitioner for intervention to set forth "the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene". An aspect is generally considered to be broader than a contention but narrower than a general reference to the NRC's operating statutes. Consumer Power Co. (Midland Plants, Units 1 and 2), LBP 78-27, 8 NRC 275, 278 (1978). A petitioner may satisfy this requirement by identifying general potential effects of licensing actions or areas of concern which are within the scope of matters that may be considered in the proceeding.

Petitioner lists 21 aspects. A significant number are specific in scope. Coalition asserts it will file contentions, among which it will allege that there exists no reasonable assurance: Applicant will comply with quality assurance and quality control requirements; the

geology of the site has been properly assessed and taken into consideration in the engineering of the project; emergency response plans for the project are sufficient; operation of the project will not irreparably harm the aquatic life of the Chehalis River; and somatic, tetralogenic and genetic impacts of radiation released from the project will not endanger the public health and safety. The above examples of the aspects Petitioner submitted satisfy the requirements of 10 CFR 2.714(a)(2). They identify aspects which are within the scope of matters that may be considered within an operating license proceeding and are sufficient to apprise parties with respect to the contentions it may draft.

Factors For Considering A Late Filed Petition

Section 2.714(a)(1) of the regulations provides nontimely filings will not be entertained absent a determination by the licensing board that the petition should be granted based upon a balancing of the following factors:

- (i) Good cause, if any, for failure to file on time;
- (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 burden is on the petitioner to demonstrate that a balancing of the five factors is in its favor. Duke Power Co. (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-615, 12 NRC 350, 352 (1980). Failure to show good cause for late filing means petitioner must shoulder a heavier burden with respect to other factors. Virginia Electric and Power Company (North Anna Station, Units 1 and 2), ALAB-289, 2 NRC 395, 398 (1975). Petitioners for intervention who inexcusably miss the filing deadline by months do not have an enormously heavy burden to meet. See Puget Sound Power and Light Company, et al (Skagit Nuclear Project, Units 1 and 2) ALAB-559, 10 NRC 162, 172 (1979).

1. Good Cause

Coalition has a variety of reasons why it filed the petition more than 4 months late, none of which individually or cumulatively constitute good cause.

The Federal Register notice was overlooked at a time when Coalition was in the process of filing contentions in WPPSS Nuclear Project No. 1. It expected notice would appear in the Portland, Oregon newspaper and none was found. Member Jim Duree, active in the construction permit phase of the plant, having received notices pertaining to the facility never was sent information regarding the docketing of the application and the notice of opportunity for hearing. Some two months elapsed after the filing deadline when Coalition received notice of it. It waited an additional 2 months to file the petition because of news reports that the project was going to be terminated due to financial problems. It took more time to prepare the petition because the

circumstances of the plant's construction were different than it anticipated.

The notice the agency provided of the opportunity for hearing and the deadline for filing was fully adequate to apprise Coalition of the matter. Publication of the notice in the Federal Register is deemed to have been given to all persons residing within the United States. 44 U.S.C. 1508. Notice was published in 3 newspapers within Washington, one being The Daily Word, of Aberdeen, Washington where member Duree resides. The failure of the Coalition to become aware of the notice until 2 months after the passage of the deadline for filing was clearly due to a lack of due diligence on the part of the organization, which is not a neophyte in these areas. The further delay of 2 months was caused by either a failure to evaluate the situation properly or resulted from the strategy Coalition was following, which in either case was the voluntary action of the organization for which it must take responsibility.

Coalition has not established good cause for its late filing of more than 4 months. It is a factor to be weighed against the granting of the petition to intervene.

2. Availability of Other Means To Protect Petitioner's Interest

Coalition asserts there are no other means to protect its interest other than intervention. It states that the adjudication of the operating license application is the last available forum before NRC prior to plant operation, and that commenting on the SER and DEIS or entering a limited appearance statement are insufficient to protect its significant specified interests that have been and will be identified

further. Coalition claims Staff does not adequately represent the interests put forth by Petitioner and that their positions would differ on the regulatory application of the results of the same tests.

Staff concedes this factor is to be weighed in Petitioner's favor. It offers no alternative other than to allow participation in the licensing proceeding which would enable Coalition to pursue its interests.

Petitioner's specified aspects cover a broad area. The ability to comment on the SER and DEIS would not permit Coalition to fully develop before the agency all of the areas in which it has an interest. Participational rights including entitlement to present evidence and conducted cross-examination are not met by allowing a petitioner the ability to offer comment within a prescribed area. Certainly a limited appearance statement, which is not evidence, also is no substitute.

Applicant offers as an alternative to Petitioner's participation in the operating license process, the opportunity to file a petition under 10 CFR 2.206. The section provides that any person may file a request for the Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director of Inspection and Enforcement, as appropriate, to institute a proceeding to modify, suspend or revoke a license, or for such other action as may be proper. It is not another means to protect Petitioner's interest as the cited section relates to enforcement matters, which is not a significant interest of Petitioner, who is concerned with public health and safety issues in licensing the operation of the plant.

This factor weighs for the admission of petitioner to the proceeding.

3. Assist In Developing A Sound Record

The criterion in the regulation is whether "petitioners participation may reasonably be expected to assist in developing a sound record". To prevail on the third factor petitioner must affirmatively demonstrate a special expertise which would aid in the development of a sound record. Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Station), LBP 80-14, 11 NRC 570, 576 (1980). A petitioner addressing this factor "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 and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2) ALAB-704, 16 NRC _____, slip op. at 10, December 8, 1982.

Petitioner has made a sufficient showing on the third factor for it to weigh in its favor. Coalition, in being since 1969 has a track record "from which it may reasonably be expected to assist in developing a sound record." It lists on page 2 of the petition the cases in which it had full party status before this Commission. They are the applications for construction permits for the Skagit Nuclear Project, Units 1 and 2, the Pebble Springs Nuclear Plants, Units 1 and 2), and the Skagit/Hanford Nuclear Projects, Units 1 and 2, and two license amendment proceedings for the Trojan Nuclear Power Plant. It presented witnesses in the Trojan Spent Fuel License Amendment

proceeding and conducted extensive cross-examination in the Trojan Control Building License Amendment case which led to additional technical specifications to be imposed by Staff. The foregoing demonstrates an ability to contribute positively in making a record in Commission licensing proceedings and evidences a special expertise in the area. The 21 aspects listed on pages 3 and 4 of the petition detail the issues it plans to cover. It identified, by occupation, a former WPPSS quality assurance worker who has agreed to assist the organization. Quality assurance is an area of concern to Petitioner and is identified as an issue on which it intends to file contentions as set forth in its list of specific aspects.

On other possible issues the presentation by Coalition is weaker. It is only in the process of attempting to identify experts in areas such as radiation, health physics, geology, hydrology engineering, fisheries and nuclear safety. Until such experts are identified, there can be no naming of witnesses or outlining of their proposed testimony.

Although petitioner has not made the strongest of showings on the third factor, it is sufficient for us to conclude Coalition may reasonably be expected to assist in developing a sound record based upon its past performance. It is expected it can do so in this proceeding at least in the area of quality assurance and very possibly in others.

Applicant placed undue reliance on Florida Power & Light Company (St. Lucie Nuclear Power Plant, Unit No. 2) ALAB-420, 6 NRC 8, 23 (1977) to conclude that the third and other factors are not applicable in a proceeding where there would be no hearing absent

permitting intervention. The facts in the cited case are different from the one at bar. In St. Lucie there was a satisfactory explanation for failure to file on time and not much reliance on the four factors was needed for a determination. The Appeal Board has more recently upheld the application of these factors where a late filing was made, without good cause, in an otherwise uncontested licensing proceeding. See Grand Gulf, ALAB-704, supra, slip op. at 9 and 10.

4. Possible Representation By Existing Parties

As conceded by Staff, this factor must also be decided in Petitioner's favor. There are no other intervenors participating so there is no basis for representation there. Although Staff might represent Coalition there is no indication that there is compatibility on the issues. Petitioner is of the position they differ and it remains uncontroverted by Staff. There is no dispute to the fact the Staff has a duty to see that the public interest in the enforcement of the Atomic Energy Act's requirements is met. That does not mean Staff's view of the public interest in all instances will be identical with that of all individuals or groups. If it were the case there would be no need ever for having intervenors in licensing proceedings, for which the regulations provide. This factor weighs in Petitioner's favor for intervention.

5. Possibly Broadening The Issues Or Delaying The Proceeding:

The last factor to be considered is the extent to which late intervention will broaden the issues or delay the proceedings. Petitioner recognizes its late filing will cause a delay of some 4 months, which it contends in comparison to the extensive period required to complete plant construction is insignificant, and therefore the

factor may not weigh against Coalition. At page 6 of the petition, Coalition states the plant is 65 percent constructed and if work proceeds completion is yet four years away.

Applicant is of the position that admission of the petitioner will delay the proceeding and the hearing that would be triggered will require Applicant and Staff to divert resources away from other tasks. It considers this factor to weigh heavily against intervention.

Staff contends that at the operating license stage where a hearing is not mandatory and would not be held were the Licensing Board to deny intervention it is simply indisputable that participation by Coalition, the only intervenor, will both broaden the issues and delay the proceeding because absent petitioner's intervention there would be no hearing. It too makes the argument that the admission of Coalition and the related hearing that would result will require Applicant and Staff to divert resources from other tasks.

In evaluating this factor at this stage it must be done on the assumption there is sufficient merit to what petitioner seeks to litigate that Coalition will be admitted as a party and that a hearing will follow. If Petitioner cannot follow up with an allowable contention there will be no broadening of issues or meaningful delay. Both Applicant and Staff have impliedly accepted this assumption in presenting their positions. The issues will be broadened in approving late intervention in the sense that issues will be presented for the first time where none existed previously. This factor cannot be weighed heavily against petitioner, working on the assumption there is value to their development. Pursuing the issues will not be an unnecessary

exercise and the fact that Applicant and Staff have already committed resources to other projects should not be a major consideration. If there are outstanding questions involving public health and safety relating to operation of the plant, the necessary action to resolve them should be taken rather than attempting to quiet the matter by invoking the doctrine of estoppel by laches.

Clearly Petitioner should be charged with the time the late filing has taken and any additional time that may further be expended in resolving the matter of the lateness.

Because the late filing resulted in a delay of the proceeding, this factor must be evaluated as weighing against intervention, but the weight to be given to the factor it should not be significant.

Conclusion On The Balancing Of Factors For
Considering A Late Filed Petition

The Licensing Board determines that a balancing of the 5 factors set forth in 10 CFR 2.714(a)(1) requires the granting of the late filed petition. Coalition has sustained its burden that the factors should be balanced in its favor. The fact that the lateness in making the filing is measured in months rather than years reduced the level of the burden Petitioner had to meet.

Petitioner did not establish good cause for the late filing which placed a heavier burden on Coalition with respect to the other factors. Three of the other factors were found to be in Petitioner's favor and one against but not to a material degree. The 3 factors in Petitioner's favor balance the criteria in its favor.

The most important factor in overcoming the lack of good cause in making the late filing is that Coalition may reasonably be expected to assist in developing a sound record. Its past performance has shown it can do so and there is no reason to believe it cannot perform in a similar manner in this proceeding. There are no other means whereby the Petitioner's interest will be protected and petitioner's interest will not be represented by existing parties. The last 2 factors alone are not sufficient to justify granting intervention but when combined with Petitioner's ability to assist in developing a record they are enough to throw the balance in Coalition's favor. Participation will delay the proceeding but not for a significant period. The last factor has a small negative effect in the balancing of the factors but not enough to make a difference.

Under the circumstances of the case a delay of four and a half months in filing the petition is insufficient to deny Coalition participation. It should be allowed to develop the record on alleged unresolved health and safety issues.

In having found that Coalition has met the stricter requirements for intervention under 10 CFR 2.714(a)(1), no purpose would be served in discussing whether the Petitioner has met the requirements for discretionary intervention. Portland General Electric Company, et al. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614 (1976). Furthermore petitioner never requested that determination.

Supplemental Petition And Special Prehearing Conference

Coalition has established standing to intervene in the proceeding but as required by 10 CFR 2.714(b), it has the burden of filing a supplement to its petition, which must include one allowable contention for it to be admitted as a party intervenor in the proceeding. Following the filing of the supplemental petition, this Licensing Board will then conduct a special prehearing conference in accordance with the provisions of 10 CFR 2.751a with the time and place to be designated by further notice.

The conference will be held in order to:

- (1) Permit identification of the key issues in the proceeding;
- (2) Take any steps necessary for further identification of the issues;
- (3) Consider all intervention petitions to allow the presiding officer to make such preliminary or final determination as to the parties to the proceeding; and
- (4) Establish a schedule for further actions in the proceedings.

Applicant, Staff and Coalition, or their counsel, are directed to appear at the special prehearing conference, which will be recorded verbatim.

Applicant, Staff and Petitioner should confer and within 10 days of the service of this Memorandum and Order shall submit to the Licensing Board a recommended date for the submission of contentions by Petitioner and the time and place for holding the special prehearing conference. The recommended scheduling should have built in 10 days for Applicant to answer the proposed contentions and 15 days for Staff, to be followed by an additional 15 days before the special prehearing conference is held. This scheduling, ordered for good cause pursuant to 10 CFR 2.711, is to

allow the participants ample time for filing pleadings and to permit the Licensing Board to review them before the start of the special prehearing conference. If there is unanimity on the proposed scheduling only a single response is necessary, otherwise participants should submit their individual proposals.

ORDER

Based upon all of the foregoing, the Licensing Board finds:

(1) Coalition has satisfied the interest and standing requirements of 10 CFR 2.714 for intervention.

(2) Coalition has satisfied the requirements of 10 CFR 2.714(a)(1) for the Licensing Board to accept its late filed petition.

It is therefore, hereby Ordered:


(1) Coalition shall file a supplement to its petition to intervene containing its contentions set forth in accordance with 10 CFR 2.714(b);

(2) A special prehearing conference shall be held pursuant to 10 CFR 2.751a, to be attended by participants or their counsel; and

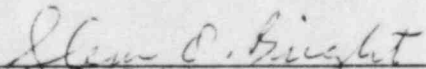
(3) Participants shall submit to the Licensing Board within 10 days of the service of this order, a recommended schedule for the

submission of proposed contentions, responses and for the holding of a special prehearing conference, prepared in the manner set forth in the Memorandum.

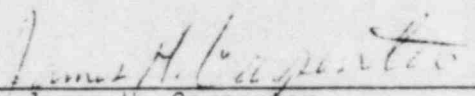
The Atomic Safety and Licensing Board



Morton B. Margulies, Chairman
Administrative Judge



Glenn O. Bright
Administrative Judge



Dr. James H. Carpenter
Administrative Judge

Dated at Bethesda, Maryland
this 21st day of April, 1983.