

01/24/83

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. 50-397-CPA
<u>et al.</u>)	50-460-CPA
(WPPSS Nuclear Project Nos. 1 & 2))	

NRC STAFF RESPONSE TO THE SUPPLEMENT TO REQUESTS
FOR HEARING FILED BY THE COALITION FOR SAFE POWER

I. INTRODUCTION

On January 10, 1983, the Coalition for Safe Power (CSP) filed a document entitled "Coalition for Safe Power Supplement to Request for Hearing and Petition for Leave to Intervene" in which CSP sets forth two contentions asserting that (1) Washington Public Power Supply System (WPPSS) does not have good cause to extend the construction completion dates for WPPSS Nuclear Project No. 1 (WNP-1) and No. 2 (WNP-2) and (2) that the requested extension for WNP-1 is not for a reasonable period of time.

For the reasons set out below the NRC Staff believes that the two contentions should not be admitted and that no further proceedings are warranted.

II. BACKGROUND

On July 21, 1981, WPPSS filed an application for an extension of its construction permit completion date for WNP-1 from January 1, 1982 to June 1, 1986. The application is pending before the NRC staff. On

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March 18, 1982, CSP filed with the Commission a Request for a Hearing in connection with this application. On September 4, 1981, WPPSS filed a similar application for an extension of its construction permit completion date for WNP-2 from December 1, 1981 to February 1, 1984. The application submitted in connection with WNP-2 was granted on January 27, 1982 (47 Fed. Reg. 4780). On February 23, 1982, CSP filed with the Commission a Request for a Hearing on this application.

In an Order issued on October 8, 1982, CLI-82-29, the Commission addressed CSP's two requests for hearings, referring them to an Atomic Safety and Licensing Board for further consideration. In addition, the Commission clarified the nature of the issues that could be considered in connection with a challenge to an application for an extension of a construction completion date.^{1/} The Commission here determined that in order to be admissible in this type of proceeding a contention must establish that the applicant was both (1) responsible for the delays and that (2) the delays were dilatory and thus without good cause; such contention, if properly particularized and supported, would be litigable.^{2/} In applying the foregoing the Commission decided that, with one exception, the contentions stated in CSP's two Requests did not come within the matters that could be considered in this type of proceeding. The one exception dealt with the allegation that "delays in construction have been under the full control of the WPPSS management."

^{1/} Washington Public Power Supply System (WPPSS Nuclear Project Nos. 1 & 2) CLI-82-29, 16 NRC____, slip. op., October 8, 1982.

^{2/} Id., at 16. The Commission did not address the criteria set forth in 10 C.F.R. § 2.714 dealing with other requirements that must be met before a person can successfully intervene.

III. DISCUSSION

Interest or Standing

Section 189(a) of the Atomic Energy Act, 42 USC 2239(a)(1976), provides that in any "proceeding" for the "amending" of a license, ". . . 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". Similarly, Section 2.714(a) of the Commission's Rules of Practice provides that "Any 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". In seeking to conclude whether the requisite interest prescribed by both the statute and the regulation are present, the Commission has held that judicial concepts of standing are controlling. Specifically, in Pebble Springs the Commission stated that "in determining whether a petitioner for intervention in NRC domestic licensing proceedings has alleged an 'interest [which] may be affected by the proceeding' within the meaning of Section 189(a) of the Atomic Energy Act and Section 2.714(a) of the NRC's Rules of Practice, contemporaneous judicial concepts of standing should be used."^{3/} Thus, under this standard the petitioner must show (1) "injury in fact" and (2) an interest "arguably within the zone of interest" protected by the statute invoked. Id at 613.

^{3/} Portland General Electric Co. (Pebble Springs Nuclear Plant, Unit 1 and 2), CLI-76-27, 4 NRC 610, 613-614 (1976).

Similarly, when an organization requests a hearing, it must either show that it has standing,^{4/} or that at least one of its members has standing in his or her own right and that the member has authorized the organization to represent its interests. Allens Creek, supra at 389-397. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 645 (1979); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-322, 3 NRC 328 (1976). See also, Worth v. Seldin, 422 U.S. 490 (1975). A demonstrable environmental or health interest of an organization member affected by the outcome of a proceeding can serve to confer standing upon an organization. See, e.g., Marble Hill, supra. Where an organization seeks to establish standing based on the asserted interests of its members, the specific members must be identified, how their interest may

4/ A "public interest" or "special interest" group would not ordinarily possess independent standing for the purposes of NRC proceedings. See Sierra Club v. Morton, 405 U.S. 727, 735 (1972), cited with approval in Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station), ALAB-535, 9 NRC 377, 391 (1979), where it was held that the Sierra Club could not derive standing based on:

"a mere 'interest in a problem,' no matter how long-standing the interest and no matter how qualified the organization is in evaluating the problem--[the interest] is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the [Administrative Procedure Act]".

Under the Atomic Energy Act and the Commission's regulations, there is no provision for private attorneys general. Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 and 2), ALAB-333, 3 NRC 804, 805 n. 6 (1976); Long Island Lighting Company (Shoreham Nuclear Power Station), LBP-77-11, 5 NRC 481, 483 (1977).

be affected must be shown and the members' authorization to the organization must be established.^{5/} Absent express authorization, groups may not represent other than their own members, and individuals may not assert the interest of other persons. Tennessee Valley Authority (Watts Bar Nuclear Generating Station, Unit 1), ALAB-413, 5 NRC 1418 (1977); Long Island Lighting Company (Shoreham Nuclear Power Station), LBP-77-11, 5 NRC 481, 483 (1977).

CSP's Requests

In seeking to meet the above requirements for standing, CSP asserts that "[t]he interests of the Coalition are predicated on the interests of its members". Requests at 2. Moreover, Petitioner asserts that the interests of its members are directly affected by the present action in that: (i) certain of its members live within close proximity to the Columbia River on which the facility is located; (ii) its members are ratepayers whose electric bills include payments for the facility; (iii) its members live, work, travel and recreate in close proximity to the facility; (iv) its members eat foodstuffs grown and produced in areas that would be negatively impacted by the potential operation, normal or otherwise, of the facility; and (v) the Coalition's work itself is conducted in part in Richland, Washington, due to the location of the

^{5/} Edlow International Company, CLI-76-6, 3 NRC 563 (1976). Allied General Nuclear Service (Barnwell Fuel and Recovery Station), LBP-76-12, 3 NRC 277 (1976), aff'd, ALAB-328, 3 NRC 420 (1976); Duquesne Light Company (Beaver Valley Power Station, Unit No. 1), ALAB-109, 6 AEC 487, 488-89 (1973).

local public document room there. Requests at 2.^{6/} In addition, the Requests state that at least one member resides within a 20 mile radius of the facility. Id.

Sufficient interest or standing does exist if a petitioner's residence is located within close proximity of a power reactor facility.^{7/} Standing may also be conferred based on the

6/ The petitioner has also attached an affidavit, of Mr. M. Terry Dana. The affiant states that he is member of the Coalition for Safe Power and that he authorizes the Coalition, through its officers and attorneys, inter alia to represent his interest before the Nuclear Regulatory Commission on any matter pertaining to nuclear units 1 and 2 or 4 of the Washington Public Power Supply System. Mr. Dana states that he lives in Richland, Washington.

The Staff notes that a number of the above grounds for standing advanced by CSP are, on their face, deficient as a matter of law. Specifically, the law is clear, we believe, that the economic interest of ratepayers - asserted by the petitioner - simply does not come within the "zone of interest" protected by the Atomic Energy Act. See, Portland General Electric Co. (Pebble Springs Nuclear Plant, Unit 1 and 2), CLI-76-27, supra 4 NRC at 614. Similarly, Petitioner's argument that its members eat foodstuffs grown and produced in the proximity of the facility is far too speculative to confer standing upon the organization. As the Licensing Board observed in rejecting a similar argument in the operating license phase, "[w]e realize that there is a possibility that people residing in Portland may consume produce, meat products, or fish which originate within 50 miles of the site, but to allow intervention on this vague basis would make a farce of § 2.714 and the rationale in decisions pertaining to petitions to intervene." Washington Public Power Supply System (WPPSS Nuclear Project No. 2), LBP-79-7, 9 NRC 330 at 336. Likewise Petitioner's general assertions that certain of its members reside in close proximity to the Columbia River or make occasional visits to the Public Document Room in Richland are - without more - insufficient to establish standing.

7/ See e.g. Tennessee Valley Authority (Watts Bar Nuclear Generating Station, Unit 1), ALAB-423, 5 NRC supra at 1421, n.4 (1977). Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-125, 6 AEC 371, 372 n.6 (1972); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Unit 1 and 2), ALAB-197, 6 AEC 188(1973); Virginia Electric and Power Company (North Anna Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1976).

close proximity to the facility of a petitioner's "normal, everyday activities"^{8/} including recreation.^{9/} The River Bend decision states that persons engaged in such activities "within 25 miles of the site can fairly be presumed to have an interest which might be affected by reactor construction and/or operation."^{10/}

The affidavit of M. Terry Dana, filed with the pending Requests, states that he is a resident of Richland, Washington, is a member of the Coalition and authorizes the organization to represent his interests in this matter. Thus, on its face this affidavit appears to fulfill the interest requirement^{11/} and is in itself sufficient to confer standing on CSP based upon the above authority.^{12/}

^{8/} Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-183, 7 AEC 222, 226 (1974).

^{9/} Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-73-10, 6 AEC 173 (1973).

^{10/} River Bend, supra at 226 (1974).

^{11/} See, Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 588, 564-565 (1980) where the Appeal Board addressing standing to intervene in a construction permit extension proceeding determined that persons who, because they reside near the facility site, have the requisite standing to intervene in a construction permit or operating license proceeding, are also possessed of standing to intervene in a construction permit extension proceeding.

^{12/} The affidavit of M. Terry Dana indicates that this Coalition member resides in Richland, Washington. The Final Environmental Statement, WPPSS Nuclear Project No. 2, December 1981, states at page 1-1 that Richland is located approximately 12 miles from the WNP-2 site. The Final Environmental Statement, WPPSS Nuclear Projects 1 and 4, March 1975, states at page 1-1 that Richland is approximately 12 miles from the WNP-1 and WNP-4 sites.

CSP's Contentions

In order for a proposed contention to be found admissible, it must comply with the requirements of 10 C.F.R. § 2.714(b). This regulation requires that in order for a contention to be admissible there must be set forth a basis for the contention with reasonable specificity.

Houston Lighting and Power Co. (Allens Creek Unit 1), ALAB-590

11 NRC 542, 546 et. seq. (1980). The purpose of the requirement is to a) assure that the contention in question does not suffer from any infirmities,^{13/} b) establish a sufficient foundation to warrant further inquiry into the subject matter addressed by the assertion, and c) put the other parties sufficiently on notice "so that they will know at least generally what they will have to defend against or oppose."^{14/}

Petitions are also required by 10 C.F.R. § 2.714 to set forth the specific aspect or aspects of the subject-matter of the proceeding as to which a petitioner wishes to intervene.

13/ A contention must be rejected if:

- (a) it constitutes an attack on applicable statutory requirements;
- (b) it challenges the basic structure of Commission's regulatory process or is an attack on the regulations;
- (c) it is nothing more than a generalization regarding the intervenor's view of what applicable policies ought to be;
- (d) it seeks to raise an issue which is not proper for adjudication in the proceeding or does not apply to the facility in question; or
- (e) it seeks to raise an issue which is not concrete or litigable.

Philadelphia Electric Co. Peach Bottom, Units 2 and 3), ALAB-216,
8 AEC 13, 20-21 (1974).

14/ Id.

In CLI-82-29 the Commission clarified the nature of the issues that can be asserted in challenging a construction permit holder's extension request. Specifically, the Commission found that the only contention raised by CSP that was potentially litigable was the allegation that "delays in construction have been under the full control of the WPPSS management". The Commission held that to the extent CSP is seeking to show that WPPSS as both (1) responsible for the delays and that (2) the delays were dilatory and thus without "good cause", such contention, if properly particularized and supported, would be litigable. CLI-82-29, slip at 16.

Contention 1

Contention 1 merely restates, in part, the various elements set forth in CLI-82-29 describing an acceptable contention in an extension proceeding. Thus, CSP alleges that:

. . . delays in the construction of WNP-1 and 2 have been under the full control of the WPPSS management. The applicant was responsible for the delays and the delays were dilatory and this applicant has not shown the "good cause" as required by 10 C.F.R. 50-55(b).

CSP argues that the reasons set forth by WPPSS for establishing the required "good cause" to merit the granting of an extension to its construction permit completion date are not an adequate basis for such relief since generally the problems with respect to completing these projects in a timely manner arose from WPPSS's mismanagement of matters within its control.^{15/}

^{15/} As noted in CLI-82-29 the factors of good cause submitted by WPPSS are: (1) changes in the scope of the project including increases in the amount of material and engineering required as a result of regulatory actions, in particular those subsequent to the Three Mile Island accident, (2) construction delays and lower than estimated productivity, resulting in delays in installation of material and equipment and delays in completion of systems necessitating rescheduling of preoperational testing, (3) strikes by portions of the construction work force, (4) changes in plant design and (5) delays in delivery of equipment and materials.

In support of this position CSP relies upon information from House Report No. 96-1452 (Committee on Government Operations, 96th Congress 2nd Session) entitled "Evaluating Nuclear Utilities Performance: Nuclear Regulatory Commission Oversight" dated October 2, 1980, and a report by the Washington State Senate Energy and Utilities Committee entitled "WPPSS Inquiry" dated March 1, 1981, both dealing with WPPSS management and its impact on construction of the nuclear facilities in question.

The foregoing reports discuss construction delays at WNP-1 and WNP-2. The Staff has reviewed the cited material in order to determine whether WPPSS was responsible for the delays in construction and whether the delays were dilatory. While the material suggests that some of the delays in construction may be attributable to WPPSS management, such a suggestion does not lead to a conclusion that such action was dilatory. The Staff believes that this document does not provide a sufficient basis to support Contention 1.^{16/}

^{16/} The U.S. House report discusses serious quality assurance problems at WNP-2. CSP submits this material in support of their challenge to WPPSS's good cause for extending the construction completion dates. This type of argument is subject to the same analysis applied by the Commission to the CSP proposed contention that delays in construction completion were due to violations of NRC regulations. The Commission determined that admission of such a contention would be contrary to the overall intent of the Atomic Energy Act and the Commission's regulations. Delays caused by correcting those violations in fact establish 'good cause' for the requested extension. To consider it otherwise would be inconsistent with the Commission's efforts to ensure the protection of the public health and safety". CLI-82-29 at 15-16. Similarly here, delays caused by resolution of problems caused by inadequate quality assurance give good cause for the extension.

The Staff believes that Contention 1 should not be admitted because notwithstanding that WPPSS may have been responsible for the delay, CSP has failed to meet the second Commission requirement, that the delays were dilatory.

Contention 2

CSP contends that the pending request for WNP-1 for an extension (to 1986) is "invalid" because of the deferral of continued construction for up to five years approved by the WPPSS Board of Directors in April 1982. On January 17, 1983, the Applicant filed a letter requesting to modify their request for an extension of the WNP-1 permit to 1991. The Staff believes that this requested modification has the effect of rendering moot this aspect of Contention 2. Contention 2 further alleges that the request is not for a reasonable period of time as required by 10 C.F.R. § 50.55(b). The Staff believes it is reasonable to infer that to the extent that CSP alleges that the request to 1986 is not for a reasonable period of time, they likewise submit that the request for an extension to 1991 is not for a reasonable period of time. In any event, no adequate basis for Contention 2 is set forth as required by 10 C.F.R. § 2.714(b). For this reason the Staff believes Contention 2 should not be accepted.

CONCLUSION

For the foregoing reasons, the Staff believes that CSP has not satisfied the requirements of 10 C.F.R. § 2.714(b) nor of CLI-82-29, with respect to setting forth at least one admissible contention. Accordingly, the two contentions should not be admitted and no further proceedings are warranted.

Respectfully submitted,

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Elaine I. Chan

Elaine I. Chan
Counsel for NRC Staff

Dated in Bethesda, Maryland
this 24th day of January 1983

