

February 23, 1983

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF POSITION ON LATE INTERVENTION

I. INTRODUCTION

On August 16, 1982, the Nuclear Regulatory Commission published a Notice of Opportunity for Hearing in the captioned matter (47 Fed. Reg. 35567 (1982)). The notice established September 15, 1982 as the deadline for filing a request for hearing and petition to intervene. On September 10, 1982, Coalition for Safe Power (CFSP or Petitioner) filed a "Request for Hearing and Petition for Leave to Intervene" (Petition), pursuant to 10 CFR § 2.714. The Petition failed to identify (by name or address) at least one member of CFSP who had standing and who had authorized Petitioner to represent his or her interests.<sup>1/</sup> The Staff responded that the Petition as drafted was defective in that respect. See NRC Staff Response to Coalition for Safe Power Request for Hearing and Leave to Intervene, dated September 30, 1982. The Board also found that CFSP's Petition was defective, but granted Petitioner leave to amend its Petition by supplying

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<sup>1/</sup> Attached to the Petition was an affidavit by Mr. Eugene Rosolie, Director of CFSP (Rosolie Affidavit), attesting that CFSP has members who live with a fifty-mile radius of WNP-1 and as close as twenty miles to the plant, and that "certain" of those members authorized CFSP to file the petition on their behalf.

the name and address of at least one member with standing to intervene, and by demonstrating either explicit representational authorization or facts which would support a presumption of authorization in this case. Memorandum and Order, dated October 13, 1982, at 4-6, citing Houston Lighting and Power Company (Allens Creek Unit 1), ALAB-535, 9 NRC 377, 393 (1979).<sup>2/</sup>

On November 2, 1982, Petitioner filed a document, entitled "Coalition for Safe Power Amendment to Request for Hearing and Petition for Leave to Intervene" (Amended Petition). Attached to the Amended Petition was the affidavit of Larry L. Caldwell (Caldwell Affidavit) which Petitioner submitted "to satisfy the identification requirements established in Houston Lighting and Power Company . . . cited in the Board's Order." At the special prehearing conference held pursuant to 10 CFR § 2.751a on January 26, 1983, CFSP informed the Board and parties, for the first time, that Mr. Caldwell was not a member of CFSP at the time of the Federal Register deadline for the filing of its Petition, but joined CFSP on or about October 11, 1982, almost four weeks later, when he signed his affidavit. Tr. 90-91. If CFSP intends to rely exclusively upon Mr. Caldwell as a basis for its standing,<sup>3/</sup> the Amended Petition

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<sup>2/</sup> The Board noted that on page two of the Petition, CFSP stated that at least one member residing in a fifty-mile radius authorized the filing of the petition. Memorandum and Order at 5.

<sup>3/</sup> The Board presently has under consideration whether it should issue a protective order to provide for the limited disclosure of the names and addresses of the two unidentified members who authorized the filing of the petition. If the Board issues such an order, the timeliness of the Amended Petition supported by the Caldwell Affidavit would become moot.

with accompanying Caldwell Affidavit must be treated as a late-filed petition under 10 CFR § 2.714 and requires a favorable balancing of the five factors set forth in § 2.714(a)(1) before it can be used to establish Petitioner's standing in this proceeding. Consequently, the Board requested that the parties address the question of whether a balancing of the five factors of 10 CFR § 2.714(a)(1) favor the admission of the Caldwell Affidavit. Tr. 118-24. As set forth below, the Staff believes that Petitioner has fallen short of its burden of demonstrating that a balancing of the five factors of § 2.714(a)(1) weigh in its favor, and consequently the Caldwell affidavit should not be admitted.

## II. DISCUSSION

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

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

The Commission has emphasized that licensing boards are expected to demand compliance with the lateness requirements of 10 CFR § 2.714. See Pacific Gas & Electric Co. (Diablo Canyon, Units 1 and 2), CLI-81-5, 13 NRC 361, 364 (1981). The burden is on the petitioner to demonstrate that a balancing of these five factors is in its favor.

1. Good Cause

The first factor in 10 CFR § 2.714(a)(1) is whether there is good cause for the filing delay. Where no good excuse is tendered for the lateness of a petition, a petitioner's demonstration on the other factors must be particularly strong. Perkins, ALAB-431, 6 NRC 460, 462 (1977).

CFSP was notified by the Staff in its September 30 response and by the Board in its October 13 Order that the Petition was deficient because it did not sufficiently identify a member upon whom it based its claim of standing. It was given the opportunity to cure that deficiency, on or before November 2 of last year, by supplying the name and address of at least one member of its organization who had standing in his own right. In response, Petitioner submitted the Caldwell Affidavit.

Petitioner claims that the Rosolie Affidavit attached to the original Petition established that CFSP members reside in the geographical zone of interest and that the Caldwell Affidavit was submitted only to cure the "potential defect" (failure to include a name and address) of the original Petition. Coalition for Safe Power Five Factor Test on Intervention, dated February 11, 1983 ("CFSP Pleading") at 1-2, 4. Mr. Caldwell,

however, could not have been among the members living near the plant that CFSP alluded to in its original petition because he was not yet a member. Had Mr. Caldwell been one of the members referred to in its September 10 Petition, the identification requirements of Allens Creek would have been met.<sup>4/</sup>

As good cause for the filing of the Caldwell Affidavit after the expiration of the date for filing set in the Federal Register notice, CFSP argues that: (1) Mr. Caldwell did not read the Federal Register and (2) he was not aware that CFSP could potentially represent his interests. CFSP Pleading at 4, 6-7. As a resident who lives within 10 miles of WNP-1, Mr. Caldwell should have been aware of the filing deadline by virtue of the local press or news media. In addition, failure to read the Federal Register does not justify the nontimely filing of an intervention petition. New England Power & Light Co. (NEP, Units 1 and 3), LBP-78-18, 7 NRC 932, 933-34 (1978); see Allens Creek, ALAB-574, 11 NRC 7 (1980).

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<sup>4/</sup> An apparent confusion exists with regard to the Staff's interpretation of 10 CFR § 2.714(a)(3). See CFSP Pleading at 2-4. The Staff maintains that under this provision, an intervention petition may be amended, for any reason, without prior approval of the Board up to 15 days prior to the prehearing conference. If Caldwell had been a member at the time the petition was filed, an affidavit which supplied his name and address would be within the particularization of interest contemplated by the licensing board in Washington Public Power Supply System (WPPSS Nuclear Project No. 2), LBP-79-7, 9 NRC 330, 335 & n.9 (1979) ("WNP-2").

CFSP's second argument, that Mr. Caldwell's lack of knowledge of CFSP's intent to intervene until after the filing constitutes "good cause" for filing his affidavit some six weeks after the deadline established by the Federal Register, is also not persuasive. If licensing boards were to accept this argument, an organization could circumvent the filing deadline requirements under 2.714(a) by filing a petition (without identifying any interested member) and then waiting for someone, or more likely, recruiting someone with the requisite interest to join the organization to gain retroactive standing. Certainly 10 CFR § 2.714(a) should not be construed to allow "bootstrapping" by any organization which did not have standing at the designated time.

The case of WNP-2, supra, presents a comparable factual situation to the instant case. In WNP-2, the licensing board squarely held that where an organization seeks to intervene in an operating license proceeding based on the interest of its members, at least one member must have the requisite personal interest for standing at the time the petition for intervention was filed. In WNP-2, a timely joint petition to intervene was filed by two individual petitioners on their own behalf and on behalf of an environmental group. The Board ruled that the necessary "interest" had not been demonstrated. Thus, the Board was faced with the question as to:

[W]hether the "interest" defect can be cured by acquiring a new member, residing in the vicinity of the plant, more than 2 months after the deadline for filing of petitions. The Board concludes that while the "interest" requirement may be "particularized" for timely petitioners it cannot be cured by an organization who acquires a new member considerably after the fact who has not established good cause for the out-of-time filing.

9 NRC at 335 (footnote omitted). The amended petition of the organization in WNP-2 contained the names of two additional members who claimed an interest within 50 miles of the site. Like Mr. Caldwell, neither of the individuals were members of the organization until after the filing deadline. Applying the five factor test of Section 2.714(a)(3) to the amended petition, the WNP-2 Board found that the late petition should not be accepted.<sup>5/</sup>

CFSP further argues that it was unable to obtain Mr. Caldwell's membership prior to the deadline because of the ongoing difficulty it has in locating and recruiting members in the Hanford area who want "their names publically (sic) associated with [anti-nuclear] views." CFSP Pleading at 7. Whatever associational difficulties confront CFSP, an organization centered in Portland, Oregon, they do not constitute good cause for the late-filing of the Caldwell Affidavit. Because CFSP has not made a substantial showing as to good cause for the delay in filing the Caldwell Affidavit, the first factor weighs against granting intervention based upon the November 2 Amended Petition.

2. Availability of Other Means and Representation by Existing Parties

The second factor to be considered under § 2.714(a) is whether other means are available to protect petitioner's interest. This factor weighs in favor of the granting of the Petition because there may be no means other than participating in the NRC licensing proceeding for WNP-1 which would enable CFSP to pursue its interests. Similarly, as to the

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<sup>5/</sup> The Board found that the reason given as "good cause" for the late petition, namely, that the late-acquired members were not previously aware of the proceeding, was insufficient to constitute "good cause." 9 NRC at 337.

fourth factor (the extent to which petitioner's interest will be represented by existing parties), there is no other party, apart from the NRC Staff, who might directly represent the interest of CFSP. However, the Appeal Board has observed that the availability of other means whereby a petitioner can protect its interest and the extent to which other parties will represent that interest are properly accorded relatively less weight than the other three factors in Section 2.714(a). South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981). In fact, it is "most difficult to envisage a situation in which [these two factors] might serve to justify granting intervention" to one who fails to make an affirmative showing on the other three factors. Id.

3. Development of Sound Record

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



(December 8, 1982) (citations omitted). Such "vague assertions" are all CFSP has come forward with. CFSP Pleading at 8.<sup>6/</sup>

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

4. Delay and Broadening of Issues

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

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

because absent CFSP's intervention there would be no hearing.<sup>7/</sup> However, because of the latest completion date for WNP-1, the Staff does not believe this factor should be accorded as much weight as if the proceeding were at a later stage.

In sum, the first, third and fifth factors weigh against CFSP. While there may not be any other forum (second factor) or party (fourth factor) which might afford protection to CFSP's interest, these factors are accorded relatively less weight than the others. On balance, the factors to be considered under 10 CFR § 2.714 weigh against granting CFSP late intervention based up on the Caldwell Affidavit. As observed above,<sup>8/</sup> Petitioner may well be able to derive standing from the personal interests of members referred to in the Rosolie Affidavit under an agreed upon non-disclosure arrangement. This would appear to the Staff to be the preferable course here given the decisional precedent against deriving organizational standing from an after-acquired member.<sup>9/</sup>

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<sup>7/</sup> CFSP has argued that this factor is moot since no hearing would be held if Petitioner's request for hearing is not granted. CFSP Pleading at 9. The plain language of 10 CFR § 2.714(a) requires that each of the five factors contained therein be evaluated. See Diablo Canyon, 13 NRC at 364; Grand Gulf, ALAB-704, 16 NRC \_\_\_\_\_, slip op. at 9-10. Furthermore, Petitioner's argument that any delay would not affect the operation of WNP-1 should be rejected. The regulation expressly refers to delay of the proceeding, not to delay operation of the facility. See generally Allens Creek, ALAB-671, 15 NRC 508, 511 (1982); Summer, ALAB-642, supra, 13 NRC at 886.

<sup>8/</sup> See n. 3 supra.

<sup>9/</sup> See discussion of WNP-2, supra, pp. 6-7.

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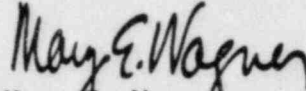
<sup>8/</sup> See n. 3 supra.

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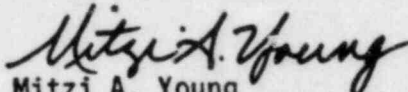
III. CONCLUSION

For the reasons set forth above, CFSP has not shown that a balancing of the five factors of 10 CFR § 2.714 warrant the granting of its late-filed Amended Petition and accordingly that Amended Petition should not be accepted by the Board.

Respectfully submitted,



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Dated at Bethesda, Maryland  
this 23rd day of February, 1983

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF POSITION ON LATE INTERVENTION" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, by deposit in the Nuclear Regulatory Commission's internal mail system this 23rd day of February 1983:

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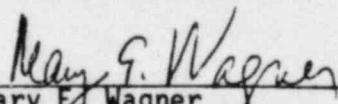
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