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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
KANSAS GAS AND ELECTRIC COMPANY &)	Docket No. 50-482 OL
KANSAS CITY POWER & LIGHT COMPANY)	
)	
(Wolf Creek Generating Station,)	
Unit No. 1))	

NRC STAFF RESPONSE TO NUCLEAR AWARENESS
NETWORK, INC. PETITION FOR LEAVE TO
INTERVENE AND REQUEST FOR HEARING

I. Introduction

On December 18, 1980, the Nuclear Regulatory Commission ("Commission") published in the Federal Register (45 Fed. Reg. 83360) a notice of opportunity for hearing in connection with the issuance of an operating license in the above-captioned matter. The notice provided that any person whose interest may be affected might file a petition for leave to intervene no later than January 19, 1981. Two petitions to intervene related to offsite emergency preparedness, were granted and two party-intervenors were admitted in the Board's March 13, 1981 Memorandum and Order. The first stage of the hearing was held between January 17 and January 26, 1984 and the final stage is scheduled for the period between February 14 and February 23, 1984.

In a late-filed petition dated January 19, 1984 ("Petition"), Nuclear Awareness Network, Inc. ("NAN" or "Petitioner"), by and through its Director, Mary M. Stephens, requested leave to intervene in this proceeding

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and requested that special evidentiary hearings be held to investigate "a systematic breakdown between construction site practices and quality assurance/quality control." (Petition at 3).

The Petitioner acknowledges that its Petition is late-filed but asserts that it has shown that it has the requisite interest to establish standing and further asserts that a balancing of the five-factor test governing its late-filed intervention petition weighs in favor of granting its Petition. (Petition at 1 and 7-11).

For the reasons discussed below, the NRC staff believes that Nuclear Awareness Network has not established the requisite standing to intervene, although it has identified specific aspects of the subject matter of the proceeding in which it wishes to intervene which appear to be within the scope of an operating license proceeding. With respect to the balancing of the five factors set forth in 10 C.F.R. § 2.714(a)(1) to justify a nontimely filing, the Staff believes that on the basis of the information furnished in the late petition for leave to intervene that a balancing of the factors would tip the scale against the late intervention.

II. Discussion

A. Interest and Standing

Section 2.714(a) of the Commission's Rules of Practice provides that "[A]ny 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 determining whether the requisite interest is present, the Commission has held that judicial concepts of standing are controlling. Specifically, in Pebble Springs the Commission stated that "in deter-

mining 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."^{1/} 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.

Where an organization petitions to intervene, it must either show that the group itself has standing or that at least one of its members has standing and that the organization has been authorized to represent that member. 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 329 (1976). 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). See Warth v. Seldin, 422 U.S. 490, 511 (1976) and Sierra Club v. Morton, 405 U.S. 727, 740 (1972).

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

A demonstrated environmental or health interest of an organization member affected by the outcome of a proceeding can serve to confer standing upon an organization.^{2/} See, e.g., Marble Hill, *supra*.

The Commission's case law has established that where a specific personal injury is alleged to result from the proceeding, sufficient interest or standing is shown by a petitioner's residence in close geographic proximity to the plant, an area which could be affected by routine or accidental release of fission products from the plant.

Virginia Electric Power Company (North Anna Power Station, Units 1 and 2), ALAB-146, 6 AEC 631 (1973), ALAB-522, 9 NRC 54, 56 (1979); Tennessee Valley Authority (Watts Bar Nuclear Generating Station, Unit 1), ALAB-413, 5 NRC 1418, 1421 n.4 (1977); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-125, 6 AEC 371, 372 n.6

^{2/} 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 on 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 longstanding the interest and no matter how qualified the organization is in evaluating the problem is not sufficient by itself to render the organization 'adversely affected' 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).

(1973); Northern States Power Co. (North Anna Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1976). In addition to nearby residence, the pursuit of normal and recreational activities near the site has also been viewed as sufficient to support standing. Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-183, 7 AE 222, 223-24 (1974); Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-73-10, 6 AEC 173 (1973).

B. Interest and Standing of Petitioner in This Proceeding

Petitioner states that Nuclear Awareness Network, Inc. is "a duly authorized, not for profit, Kansas Corporation established in 1983 for the express purpose of providing education, research, lobbying and testimony on issues relating to nuclear power, waste and related matters." (Petition at 1). Petitioner asserts that it has standing based on its health and safety interests of its members which may be affected by the proposed operation and on-site storage of nuclear fuel at Wolf Creek due to routine and accidental releases of ionizing radiation from the plant which may damage or destroy their livelihood, homes, property and jeopardize their recreation. (Petition at 2). The Petitioner alleges that two members, Tom and Joyce Young live within twenty miles of the site and other members including "doctors, physicists, public officials, a college dean, construction workers, attorneys and farmers," "live, work and recreate" within the geographic areas surrounding Wolf Creek and thus have interests which may be affected by the outcome of the proceeding. (Petition at 1, 2 and 3). The Petition fails to indicate whether these activities are conducted in close proximity of the plant, e.g., within 50 miles. Mary M.

Stephens asserts that she is a member and director of the Nuclear Awareness Network and is authorized to represent its members in this proceeding. (Petition at 2).

As noted above, an organization can establish representational standing if formally authorized by one of its members with the requisite standing to represent his or her interests. The Petition identifies two members who might have standing based on their geographical proximity to Wolf Creek; however, it fails to provide a statement or affidavit by the members authorizing the filing of the Petition. By virtue of her status as both member and director of NAN, Ms. Stephens could provide the organization with standing, however there is no evidence that she has a sufficient personal interest such as residency or recreational interests to establish standing in her own right which she can in turn confer upon the organization. In the absence of additional information regarding Ms. Stephens' interest or Tom and Joyce Young's authorization to permit NAN to represent their interests in the proceedings, the Petition lacks factual support necessary to find that NAN possess the requisite standing to intervene on behalf of its members. See Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1, ALAB-535, 9 NRC 377, 393-394 (1979)).

Further, NAN has not established that it is a single-issue organization so that it may be inferred that, by joining the organization, members were implicitly authorizing it to represent any personal interests which might be affected by the proceedings. (Id., at 396). Thus, since the specific nature of the organization is not clearly demonstrated, the

mere fact of membership cannot imply that members authorized NAN to represent their personal interest in this proceeding.

For the reasons stated above, NAN has not established standing in its own right nor has it satisfied the requirement that it specifically identify and provide verification that it has at least one member who has an interest that will be affected by operation of the facility and who authorizes NAN to represent his or her interests.

C. Specific Aspect(s) Of The Proceeding

Pursuant to 10 C.F.R. § 2.714(a)(2), a petitioner is also required to identify the specific aspect(s) of the subject matter of the proceeding which the petitioner seeks to litigate.^{3/} This regulation provides the Staff and the Applicant with an early indication of the matters which may be addressed at the hearing and enables the Board to determine whether a petitioner wishes to pursue matters within its jurisdiction.

The Petition sets forth specific aspects based on incidents and workers statements on which NAN would file contentions. Although broad in scope, the Staff believes that these aspects would fall within the findings required for the issuance of an operating license under 10 C.F.R. § 50.57. These aspects include:

^{3/} An "aspect is generally considered to be broader than a "contention", but narrower than a general reference to the NRC's operating statutes. Consumers Power Co. (Midland Plants, Units 1 and 2). LBP-78-27, 8 NRC 275, 278 (1978).

1. polices practiced and permitted by the contractor which are contrary to quality assurance/quality control requirements including direction of construction workers to (a) perform work in safety related areas at variance with established procedures and (b) mislead quality control personnel.
2. forgery and falsification of work documents for safety related matters.

In the opinion of the Staff, Petitioner has identified aspects which are within the scope of an operating license proceeding and are sufficiently specific to put the parties on notice with respect to contentions it may draft. The Staff is of the view that Petitioner has satisfied the aspects requirements of 10 C.F.R. § 2.714.

D. Factors Governing Consideration of a Late-Filed Petition

A late intervention petitioner must address the five specified factors in 10 C.F.R. § 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 C.F.R. § 2.714. See Pacific Gas & Electric Co. (Diablo Canyon, Units 1 and 2), CLI-81-5, 12 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 C.F.R. § 2.714(a)(1) is whether there is good cause for the filing delay. Absent a showing of good cause for late filing, an intervention petitioner must make a "compelling showing" on the other four factors stated in 10 C.F.R. § 2.714(a) governing late intervention.^{4/}

NAN asserts that good cause exists for filing its Petition to Intervene three years out-of-time. Petitioner states that it "was unaware of the existence of the serious allegations made by... construction workers till mid-December of 1983" when the Director "was contacted by a representative of the workers." (Petition at 7). Petitioner claims that it "could not have obtained this information earlier than the moment these workers decided to make public their evidence." (Petition at 8). Petitioner's director brought these

^{4/} South Carolina Electric and Gas Company, et al. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 886 (1981), aff'd sub non. Fairfield United Action v. Nuclear Regulatory Commission, 679 F.2d 261 (D.C. Cir. 1982), Duke Power Co. Perkins Nuclear Station, Unit 1 ALAB-431, 6 NRC 460, 462 (1977).

allegations to the Board's attention in a January 5, 1984 letter to Chairman Sheldon J. Wolfe. NAN asserts that these allegations constitute newly arising information and good cause exists for its late intervention.

The Petitioner's primary support for contending good cause exists for this late filing is that Ms. Stephens was not contacted by the workers until mid-December 1983. The Staff has received information from the Applicant which indicates that the workers named by Petitioner in support of its good cause argument were contacted by Ms. Stephens and did not, as stated by Petitioner, initiate communications with NAN.^{5/} In light of this significant discrepancy the Staff is unwilling to rely upon the Petitioner's primary justification for its untimely filing. If indeed it was the Petitioner who contacted the workers, questions arise as to why such inquiry was not made earlier. Further, the Petition states that NAN was not established until 1983 and the Staff is unable to determine from the facts alleged in Petition if the NAN might have been created based on Ms. Stephen's interrogation of Wolf Creek workers. For all of the above reasons, Petitioner has not shown good cause for filing its Petition three years out of time. Therefore, this factor should weigh against the grant of late-filed intervention.

2 and 4. 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 the petitioner's interest.

^{5/} Applicants' Response to Nuclear Awareness Network, Inc. Petition for Leave to Intervene and Request for Hearing. February 3, 1984 at 11.

This factor weighs in favor of the granting of the Petition because there is no other means which would enable NAN to pursue its interests. Similarly, as to the fourth factor extent to which petitioner's interest will be represented by existing parties - there is no other party, except for the NRC Staff, who might represent its interest. 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 NAN. 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 Zimmer, 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. See generally Summer, supra, 13 NRC at 894; The Detroit Edison Company (Greenwood Energy Center, Units 2 and 3), ALAB-476, 7 NRC 759, 764 (1978).

Vague assertions regarding petitioner's ability . . . are insufficient." Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982).

Although Petitioner states that its counsel is familiar with Wolf Creek through earlier affiliations with the Kansas Corporation Commission, it fails to clearly and affirmatively demonstrate that the members upon which it intends to rely possess the special expertise necessary to document the allegations raised in its Petition. There is no evidence that NAN has retained qualified experts who would aid in the development of a sound record. While the Petitioner proffers statements made by workers in support of its yet to be filed contentions, the Petition fails to indicate whether these individuals will be called as witnesses to support Petitioner's argument.

The Appeal Board in Washington Public Power Supply System (WPPSS Nuclear Project, No. 3), ALAB-747, slip op. at 18, applied the guidance of Grand Gulf stating "the [Petitioner] should both (1) identify specifically at least one witness it intends to present; and (2) provide sufficient detail respecting that witness' proposed testimony to permit the Board to reach a reasoned conclusion on the likely worth of that testimony on one or more of the contentions admitted in the Board's ... [earlier] memorandum and order." The NAN Petition neither identifies any specific witness whom it intends to call as a prospective witness, nor provides any information on what testimony it intends to produce in support of its assertion that it will assist in developing a sound record. Although the Petition identifies workers whose testimony would be crucial in the development of NAN's contentions, it does not identify these individuals as prospective

witnesses. Further, the Applicant in its February 3, 1984, "Response to Nuclear Awareness Network, Inc. Petition for Leave to Intervene and Request for Hearing" produced a sworn affidavit indicating that NAN materially misrepresented statements made by the workers. NAN has failed to fulfill its Grand Gulf obligation in its Petition. Petitioner fails to meet the burden with regard to this factor.

5. 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 NAN. 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). The Petitioner is three years late with its petition to intervene and half of the hearing was conducted earlier this month with the balance of the hearing scheduled for mid-February 1984. It is indisputable that intervention by NAN followed by the requisite findings on contentions, and the discovery process will broaden the issues and greatly delay the proceeding. Given these circumstances, the burden on Petitioner of showing of good cause and demonstrating its potential contribution to a sound record is substantial and has not been met.

In summary, the first, third and fifth factors weigh against NAN. While there may not be any other forum (second factor) or party (fourth factor) which might afford protection to CSP's interest, these factors are accorded relatively less weight than the others. On balance, the factors to be considered under 10 C.F.R. § 2.714 weigh against granting NAN late intervention.

E. Discretionary Intervention

Where petitioners do not meet the tests for intervention as a matter of right, adjudicatory boards may exercise discretion in ruling on questions of participation where petitioners show significant ability to contribute on substantial issues of law or fact which will not otherwise be properly raised or presented, have set forth these matters with suitable specificity to allow evaluation, and demonstrate their importance and immediacy, justifying the time necessary to consider them. Pebble Springs, supra, CLI-76-27, at 614.

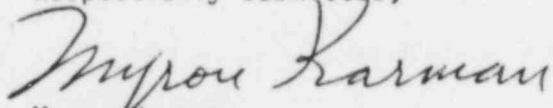
The most important consideration should be the one concerning the petitioner's ability to make a valuable contribution to a sound record. Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-397, 5 NRC 1143 (1977). The burden of convincing the Board of petitioner's capability in this area should lie with that petitioner. Nuclear Engineering Company, Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 743-44 (1978). As discussed above regarding the third factor, Petitioner has not demonstrated its ability to make a valuable contribution to a sound record, therefore, NAN's petition to intervene should not be granted as a matter of the Board's discretion.

III. CONCLUSION

For the reasons set forth above, the Staff concludes that NAN failed to establish the requisite standing to intervene although it identified specific aspects of the subject matter of the proceeding in which it wished to intervene. After considering the five factors in 10 C.F.R. § 2.714(a) for late intervention, the Staff concludes that on

balance that the NAN Petition to Intervene and Request for Hearing should be denied.

Respectfully submitted,



Myron Karman
Deputy Assistant Chief Hearing Counsel



Elaine I. Chan
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 8th day of February, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

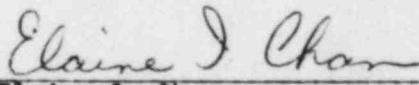
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
KANSAS GAS AND ELECTRIC COMPANY &)	Docket No. 50-482 OL
KANSAS CITY POWER & LIGHT COMPANY)	(ASLBP No. 81-453-03)
(Wolf Creek Generating Station,)	
Unit No. 1))	

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.713(b), the following information is provided:

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Dated at Bethesda, Maryland
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