UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman
Gary J. Edles
Howard A. Wilber

September 29, 1983
(ALAB-743)

In the Matter of	)	
LONG ISLAND LIGHTING COMPANY	)	Docket No. 50-322-OL-3
(Shoreham Nuclear Power Station, Unit 1)	)	Emergency Planning

Lucinda Low Swartz, Washington, D.C. (with whom Ronald A. Zumbrum and Sam Kazman, Washington, D.C., were on the brief), for the petitioner, Citizens for an Orderly Energy Policy, Inc.

W. Taylor Reveley, III, Richmond, Virginia (with whom James N. Christman, Richmond, Virginia, was on the brief), for the applicant, Long Island Lighting Company.

David A. Repka for the Nuclear Regulatory Commission staff.

DECISION

Opinion for the Board by Messrs. Rosenthal and Wilber:

Before us is the appeal under 10 CFR 2.714a of Citizens for an Orderly Energy Policy, Inc. (Citizens), from the Licensing Board's July 28, 1983 memorandum and order denying its petition for leave to intervene in this operating license proceeding involving the Shoreham nuclear facility

on Long Island, Suffolk County, New York.[1] The denial was founded solely on the petition's untimeliness; i.e., the Board found it unnecessary to reach the additional, and substantial, question of Citizens' standing to intervene.[2]

Finding ourselves in basic agreement with the Licensing Board's analysis of the considerations governing the acceptance or rejection of tardy petitions,[3] we concur in its ultimate conclusion that there is insufficient cause to allow Citizens to enter the proceeding at this late date.

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[1] See LBP-83-42, 18 NRC ___.

[2] Id. at ___ (slip opinion at 13).

[3] In passing upon an untimely intervention petition, the Licensing Board is to consider and balance the following five 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.

10 CFR 2.714(a)(1).

We thus affirm the result below. In doing so, we follow the Licensing Board's lead and eschew ruling on whether Citizens' asserted interest in the outcome of the proceeding is of the stripe cognizable under the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2011 et seq. At our request, that question was explored at some length both in the parties' briefs and at oral argument. But it is best left for resolution when and if it should come to us in the context of an intervention petition not requiring rejection as untimely. The same may be said of the question whether, assuming that Citizens lacks standing to intervene as a matter of right, it nonetheless meets the criteria established for allowing intervention as a matter of discretion. See, e.g., Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614-17 (1976); Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-363, 4 NRC 631 (1976).[4]

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[4] To the best of our recollection, this is only the second time that we have been faced with an intervention petition filed by one wishing to support without qualification the license application under consideration. See Nuclear Engineering Co., Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737 (1978). This fact reinforces the wisdom of not grappling unnecessarily with the sharply differing views of the parties on the question of Citizens' standing here. Opinions that, in the circumstances of the particular case,

(Footnote Continued)

I

A. This proceeding was instituted in March 1976 -- seven and a half years ago. Although many of the litigated questions have now been decided by the Licensing Board,[5] one major remaining issue below is that of emergency planning. That issue assumed different proportions in 1980 when, in the wake of the Three Mile Island accident the prior year, the Commission promulgated new regulations governing offsite emergency response plans for nuclear power facilities. See 10 CFR 50.33(g), 50.47.

We need not recount here the Shoreham offsite emergency planning developments between 1980 and earlier this year. For present purposes, the appropriate starting point is the February 17, 1983 resolution of the Suffolk County Legislature to the effect that the County would take no further part in the Shoreham emergency planning effort. The asserted reason for this action was that no satisfactory offsite emergency response plan could be developed.[6] On the

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are essentially advisory in nature should be reserved (if given at all) for issues of demonstrable recurring importance. See Tennessee Valley Authority (Hartsville Nuclear Plants, Units 1A, 2A, 1B and 2B), ALAB-467, 7 NRC 459, 463 (1978).

[5] See LBP-83-57, 18 NRC ___ (September 21, 1983).

[6] Suffolk County Legislative Resolution No. 111-1983. This was said to be so because of such factors as the
(Footnote Continued)

strength of that legislative action, the County -- which in 1977 had been allowed untimely intervention under 10 CFR 2.714 -- moved the Licensing Board to terminate the proceeding. Its claim was that, absent its participation in the emergency response effort, as a matter of law no operating license could be issued.

In response to the motion, the applicant asserted that adequate offsite emergency planning is achievable without Suffolk County participation. In this connection, it indicated that, if given the opportunity to do so, it would present an adequate substitute plan that did not call upon County resources.

On April 20, 1983, the Licensing Board denied the County's motion and ordered that a hearing be held on the applicant's substitute offsite emergency response plan when submitted.[7] Recognizing the significance of the interpretation of NRC regulations that undergirded this result, the Board referred its ruling for immediate

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geography and population density of Long Island and the asserted inadequacy of available evacuation routes.

[7] LBP-83-22, 17 NRC ___.

interlocutory review.[8] On May 12, 1983, it was affirmed by the Commission.[9]

On May 26, 1983, the applicant formally submitted its substitute offsite emergency response plan. (By that date, a separate Licensing Board had been convened to hear and decide the offsite emergency planning issues.) On their receipt of the plan, the four intervenors seeking to litigate those issues[10] commenced with the preparation of contentions and other prehearing matters.

On June 14, 1983, Citizens filed its intervention petition and, eight days later, submitted a statement of proposed contentions. According to the petition, Citizens was formed in January 1983 by "engineers, physicians, and scientists working on various projects involving nuclear power" who "favo[r] the issuance of an operating license to the [applicant]."[11] In this regard, the petition was accompanied by the affidavits of five of Citizens' members:

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[8] LBP-83-21, 17 NRC ___ (April 20, 1983).

[9] CLI-83-13, 17 NRC ___. Although the referral had been addressed to an appeal board, the Appeal Panel Chairman transferred it to the Commission in an unpublished order entered on April 26, 1983.

[10] Suffolk County, the Shoreham Opponents Coalition, the North Shore Committee Against Nuclear and Thermal Pollution, and the Town of Southampton.

[11] Petition at 4.

a physicist, two nuclear physicists, and two health physicists, all of whom reside within 15 miles of the Shoreham plant.

As the basis for seeking intervention, the petition alleged that Citizens' members have a "strong interest in the availability of safe, clean, efficient energy sources on Long Island," which interest will be adversely affected if Shoreham is not granted an operating license.[12] Because an adverse ruling on the applicant's substitute offsite emergency response plan could result in denial of an operating license for Shoreham, Citizens therefore desires to enter and participate in the proceeding for the purpose of supporting that plan.[13]

On the matter of timeliness, Citizens sought to justify the eleventh-hour filing of its intervention petition on the basis that the events leading to the threat of a denial of the operating license application had only "recently occurred."[14] Addressing the other Section 2.714(a) lateness

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[12] Id. at 5-6. A like averment was contained in the supporting affidavits of the five individual members.

[13] Id. at 6-7.

[14] Id. at 14.

factors,[15] Citizens maintained that, inasmuch as its membership includes "recognized authorities in the field of nuclear power" and "professional[s] in radiological emergency planning", it will make a "valuable contribution" to the hearing.[16] Although explicitly acknowledging that its ultimate goal did not differ from that of the applicant, Citizens further claimed that its members' lack of financial ties to the applicant and their interest in seeing an adequate emergency plan for themselves and their families gives them a unique "perspective".[17] Citizens also observed that, as the proceeding will "initially decide the fate" of Shoreham, no other means exist for Citizens' members to protect their interests.[18] Finally, the Licensing Board was assured that Citizens would not undertake to introduce "concerns outside the scope of the hearing" or to delay the proceeding in any other manner.[19]

In response to the petition, applicant filed a general endorsement of Citizens' effort and Suffolk County took an essentially neutral position. The NRC staff, however,

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[15] See fn. 3, supra.

[16] Petition at 8.

[17] Id. at 9, 10.

[18] Id. at 11.

[19] Ibid.

opposed the petition, contending that Citizens lacked standing to intervene here, that it had made no case for allowing intervention as a matter of discretion, and that, in any event, the petition should be denied on lateness grounds. On the last point, the staff stressed that Citizens' filing was "seven years late"[20] and argued that the "recent important development" of Suffolk County's withdrawal from the emergency planning arena did not constitute good cause for the filing's untimeliness as it was "simply the latest [event] in the long and continuing process of Shoreham offsite emergency planning."[21] The staff characterized as "tenuous" Citizens' argument that its position would otherwise go unrepresented in light of the identity of Citizens' goal with that of applicant, which, the staff anticipates, "will advocate [its offsite] plan to the fullest extent possible."[22] The staff also suggested that, while Citizens' admission would not necessarily "unduly delay" the proceeding, litigation of some of its

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[20] The notice of opportunity for hearing established April 19, 1976 as the deadline for intervention petitions. See 41 Fed. Reg. 11,367, 11,368 (March 18, 1976).

[21] Staff's Response to Citizens' Petition (June 29, 1983) at 8-9.

[22] Id. at 10.

concerns might "broaden and complicate" matters.[23] With respect to Citizens' argument that its members' expertise would render unique assistance at the hearing, the staff asserted that there was no evidence to support the claim, and that "where reliance is placed on the factor of expertise, the petition should provide a bill of particulars" respecting the prospective contribution.[24]

By way of reply, Citizens reiterated its belief that the petition should not be deemed inexcusably late because "[t]he need to litigate [the] issue [of applicant's plan] did not arise until late April, 1983."[25] With regard to the staff's assertion that Citizens ought to have supplied a "bill of particulars" to document its expertise, Citizens observed that it was "unaware" of any such obligation ever being imposed on prospective intervenors, but stated that "[s]hould the Licensing Board decide . . . that a 11 of particulars' should be provided, Citizens will do so."[26]

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[23] Id. at 10-11.

[24] Id. at 9-10. The Town of Southampton also filed a response to Citizens, essentially echoing the staff's arguments. Subsequently, at a July 13 prehearing conference, the other two intervenors also indicated that they opposed another party being added to the case. Prehearing Conf. Tr. 44, 45.

[25] Reply to Staff Response (July 12, 1983) at 5.

[26] Id. at 6-7.

This matter came up again at a July 13 prehearing conference when the Chairman of the Licensing Board asked Citizens' counsel:

> What role do you intend to play in terms of cross-examining witnesses, presenting your own witnesses, and so forth?[27]

Counsel responded (in part):

> The members of Citizens do have a strong background not only in nuclear energy but also in emergency planning. A major portion of Suffolk County's contentions deal with accident assessment. They allege that accident assessment is not adequate or that it can't be done. Members of Citizens would be able to address that in a lot of detail, and I think that is an important point that we would be able to address.[28]

B. In its July 28 order, LBP-83-42, supra, the Licensing Board first determined that Citizens' intervention petition was late in that it was filed long after the deadline specified in the 1976 notice of opportunity for hearing for the submission of such petitions. Accordingly, it turned to a discussion of the five Section 2.714(a) lateness factors. On balance, the Board concluded, those factors weighed against allowing intervention.[29]

On the first factor (good cause for being late), the Board reasoned that, although the events leading to

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[27] Prehearing Conf. Tr. 34.

[28] Prehearing Conf. Tr. 34-35.

[29] 18 NRC at ___, ___ (slip opinion at 6-7, 13).

Citizens' intervention attempt were of fairly recent vintage, Citizens had provided no justification for not filing at least by February when it became aware of Suffolk County's withdrawal.[30] On the third factor (Citizens' potential contribution to the development of a sound record), the Board agreed with the staff that the petitioner had an affirmative obligation to identify the witnesses and to summarize the testimony or other evidence that it proposed to present, an obligation that the Board thought Citizens had not adequately fulfilled.[31] Respecting the fourth and fifth factors, the Board determined that Citizens had not satisfactorily explained why the applicant would inadequately represent its interests in the proceeding and that Citizens' participation might well delay the proceeding to some extent.[32] Thus, as the Board saw it, only the second factor (the availability of other means whereby Citizens might protect its interest) favored the grant of late intervention.[33]

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[30] Id. at ___ (slip opinion at 9).

[31] Id. at ___ (slip opinion at 10-11).

[32] Id. at ___ (slip opinion at 11-12).

[33] Id. at __ (slip opinion at 10, 13).

This appeal followed. It is supported by the applicant and opposed by the staff.[34]

II

Since 1972, in essentially their present form, the provisions of Section 2.714(a) concerned with the treatment to be accorded untimely intervention petitions have been embodied in the Commission's regulations. In the ensuing eleven years, there have been innumerable Licensing Board orders passing upon such petitions on the basis of an application of the five lateness factors specified in that Section. An informal survey discloses that some 22 of those orders have received appellate review on the merits -- typically by an appeal board without further review by the Commission itself. In 15 instances, the Licensing Board's balancing of the five factors led to a rejection of the petition; in all but one of those instances, the denial of the petition was affirmed. With regard to the seven

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[34] Although endorsing without reservation Citizens' claim of standing, the applicant observed in its brief (at 2) that the intervention petition "was filed years late" and that it was a "finely balanced question" whether "sufficient grounds exist to excuse the untimeliness." The applicant's ultimate conclusion was that the balance "tips in Citizens' favor." Ibid.

appealed Licensing Board grants of late petitions, five were affirmed and two were reversed.[35]

Obviously, whether any specific belated petition should be turned aside solely because of its tardiness hinges upon the totality of the circumstances of that particular case. Thus, the foregoing statistics do not of themselves have any direct bearing upon the proper disposition of Citizens' appeal here. They nevertheless are illuminating in several respects. For one thing, it is quite apparent that neither this Board nor the Commission has been readily disposed to substitute its judgment for that of the Licensing Board insofar as the outcome of the balancing of the Section 2.714(a) factors is concerned.[36] For another, as is equally

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[35] In an Appendix to this opinion, infra, pp. 50-51, we identify the appellate decisions uncovered in the course of the survey.

[36] In this connection, it might be noted that the only prior reversal of a Licensing Board denial of a late petition involved the endeavor of Erie County, New York, to participate in a proceeding concerned with a facility located near its boundaries. Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273 (1975). In that case, by a divided vote we had affirmed the denial. ALAB-263, 1 NRC 208 (1975). On its further review, the Commission observed that 10 CFR 2.714(a) gives "the Licensing Board broad discretion in the circumstances of individual cases." 1 NRC at 275. It nonetheless adopted the position of the dissenting member of this Board, which had rested heavily upon the significance that should attach to the fact that the County had a special responsibility insofar as the identification of the public interest and the vindication of public rights were concerned. See ALAB-263,

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apparent, there has not been a general inclination to favor the admission of tardy petitioners to a proceeding. Indeed, given the fact that more than two-thirds of the appellate decisions left the petitioner on the sidelines, the precisely opposite conclusion would be justified.[37]

In contrast to the petitioner in each prior case, Citizens seeks to intervene in support of the utility application under adjudication. Although this fact might well bear upon Citizens' standing to intervene -- a question that, once again, we need not here reach -- it manifestly can be assigned no weight in the determination of the lateness matter. Stated otherwise, the five Section 2.714(a) factors are to be applied in the same manner in the evaluation of all tardy petitions, irrespective of whether the petitioner favors or, instead, opposes the licensing of the facility in question. Likewise, the amount of deference

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1 NRC at 220-21 (dissenting opinion); CLI-75-4, 1 NRC at 275. The Commission also stressed that the hearing apparently would not commence for at least another six months or so. Id. at 276.

[37] As should hardly require elaboration, the exclusion from a proceeding of persons or organizations who have slept on their rights does not offend any public policy favoring broad citizen involvement in nuclear licensing adjudications. Assuming that such a policy finds footing in Section 189a. of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2239(a), it must be viewed in conjunction with the equally important policy favoring the observance of established time limits.

to be extended the Licensing Board's conclusions on the matter does not turn upon such a legally extraneous consideration.

With these preliminary observations in mind, we now turn to the petition at hand and to the reasons why, in our judgment, the result arrived at below was fully warranted, if not compelled.

A. There can be no doubt that Citizens' petition was untimely. As we have seen, fn. 20, supra, the notice of opportunity for hearing on the Shoreham operating license application stipulated that intervention petitions were to be filed no later than April 19, 1976. That deadline was never extended. Nor was there a new notice, with a new deadline, issued at the time that Suffolk County announced that it would not participate in offsite emergency response planning. This is scarcely surprising. Manifestly, that announcement did not give rise to a separate and distinct proceeding on the Shoreham application. Rather, it simply added a new dimension to the emergency planning issue that had long been an ingredient of the proceeding that commenced in 1976.[38]

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[38] In October 1977, the Licensing Board authorized discovery on an emergency planning contention of two intervenors. Tr. 50.

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In the circumstances, the first question to be examined is whether all, or any portion, of the lengthy delay in seeking intervention was warranted. This is a particularly significant inquiry. For, as we recently observed, "[i]n the absence of good cause [for its tardiness], a petitioner must make a 'compelling showing' on the other four factors in order to justify late intervention." Detroit Edison Co. (Enrico Fermi Atomic Nuclear Plant, Unit 2), ALAB-707, 16 NRC 1760, 1765 (1982), and cases there cited.

As is clear from the petition, Citizens' interest does not lie principally, if at all, in the applicant's substitute offsite emergency response plan per se; i.e., the desire of Citizens' members to support that plan does not in reality stem from a concern that, if it were to be rejected, a different and less satisfactory plan might be accepted in its stead.[39] Rather, Citizens' main objective is simply to insure the licensing of the Shoreham facility, which it

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Needless to say, the fact that a separate licensing board was recently established to consider the emergency planning issue does not suggest the institution of a new proceeding. That action was taken for administrative reasons only; i.e., because of the other demands on the time of the members of the Licensing Board that had been previously assigned to hear all issues in controversy. See, in this connection, 10 CFR Part 2, Appendix A, Section I(c)(1).

[39] See App. Tr. 107-08.

deems to be necessary in the furtherance of its members' "strong interest in the availability of safe, clean, efficient energy sources on Long Island." See p. 7, supra. As Citizens sees it, the accomplishment of that objective might be seriously threatened were the substitute offsite emergency response plan found inadequate.

That threat may well be present. But, contrary to the impression that Citizens seeks to create, the decision on whether to grant an operating license for Shoreham has never turned exclusively upon a finding favorable to the applicant on the offsite emergency planning issue. From its very outset, this proceeding has involved many discrete issues and a determination against the applicant on any one of them might have led to a denial of the license application. That at least some of these issues were not insubstantial is reflected by the fact that the recent Licensing Board decision resolving most (albeit not all) of them is some 1400 pages in length.[40] This being so, it cannot be said that Citizens' professed interest was not potentially affected prior to the County announcement. To the contrary, Citizens has had a stake in the outcome of the proceeding all along.

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[40] See LBP-83-57, fn. 5 supra.

Notwithstanding these considerations, we will assume for present purposes that Citizens' members had cause to remain passive observers prior to the time of the Suffolk County announcement that it would not participate any further in the Shoreham emergency planning effort. Such an assumption serves, of course, to reduce considerably the period of Citizens' unjustified delay in seeking intervention. But it does not eliminate it. The County Legislature acted on February 17, 1983. The intervention petition was filed on June 14 -- almost four months later.

Quite true, in the interim both the Licensing Board and the Commission were grappling with the Suffolk County motion to dismiss he proceeding. See pp. 4-6, supra. But that fact cannot be taken as a satisfactory explanation for Citizens' continued inaction once the County had made known its intentions. To our knowledge, it has never been suggested, let alone held, that one whose interest in the outcome of a proceeding is clearly affected by a new development is entitled to withhold asserting that interest to await the result of preliminary legal skirmishing concerned with the development. To the contrary, the expectation has always been that, upon learning of the development, the would-be intervenor will promptly spring into action. Moreover, it was on April 20 that the Licensing Board both denied the County's motion to dismiss and directed that a hearing be held on the applicant's

substitute offsite emergency response plan. The effectiveness of that action was not stayed; hence, it is of no moment here that another three weeks elapsed before the Commission affirmed it.

In short, even giving Citizens the benefit of all reasonable doubt on the matter of when its petition should have been filed, the inescapable fact is that it was inexcusably tardy. And that the unjustified tardiness may be measured in months rather than years does not alter the situation materially. Depending upon the status of the proceeding at the time the late petition is filed, a several month delay may or may not be consequential. Here, as we discuss further below in our appraisal of the fifth lateness factor (pp. 27-29, infra), it cannot be lightly ignored. Citizens had every reason to anticipate that a petition filed as late as June would not go unchallenged and that, if challenged, it might be rejected by the Licensing Board on either untimeliness or standing grounds. Citizens also had cause to foresee that the hearing on the applicant's substitute plan would move forward at as rapid a pace as feasible. It thus should have occurred to Citizens that, by waiting so long to file its petition, it was running the substantial risk that the hearing would be almost at hand before a favorable decision on the petition might be forthcoming at the end of an appellate review. As it has turned out, that risk materialized. The Licensing Board did reject the petition; Citizens was required to take an

appeal; and it is now barely more than two months before the scheduled start of the hearing. See p. 28, infra.[41]

B. The second and fourth factors may be considered together. We agree with the Licensing Board that Citizens has no other means available for the protection of its claimed interest in Shoreham operation (the second factor). On the other hand, in common with the Licensing Board, we think it much less apparent that the fourth factor supports allowing late intervention. Citizens' objective parallels that of the applicant -- even though it may not have precisely the same underpinnings (Citizens' members, of course, do not share the applicant's strong and direct financial stake in the outcome of the proceeding).[42] And it is reasonable to suppose that the applicant will present the strongest possible case for the viability of its substitute offsite emergency response plan. In this regard, as we discuss shortly in our appraisal of the third factor, there is nothing in the record to suggest that Citizens will

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[41] Nothing in the foregoing discussion should be understood to imply that, had Citizens filed its petition last February, intervention perforce would have been permitted. The Licensing Board would have had to inquire into Citizens' standing, and, if standing were found lacking, the Board would then have had to decide whether cause existed for allowing intervention as a matter of discretion.

[42] See App. Tr. 17-18.

supplement the applicant's presentation on the plan to any significant extent.

C. In our decision last December in Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, we stressed anew the importance of the third lateness factor -- the extent to which the petitioner's participation might reasonably be expected to assist in developing a sound record. Because of that importance, we observed, "[w]hen a petitioner addresses this criterion 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." Ibid., citing South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 886 (1981), affirmed sub nom. Fairfield United Action v. NRC, 679 F.2d 261 (D.C. Cir. 1982); Detroit Edison Co. (Greenwood Energy Center, Units 2 and 3), ALAB-476, 7 NRC 759, 764 (1978).[43]

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[43] It is not of present significance that the publication of Grand Gulf in the official NRC reports took place very recently. In its appellate brief (at 8, fn. 4), Citizens explicitly conceded that the ruling in that opinion "regarding a showing of expertise [was] not a new pronouncement" but rather rested on "earlier NRC case law" -- specifically, Summer and Greenwood, which have long been available to the Bar. Citizens insisted, however, that it had provided the information required by Grand Gulf and its predecessors.

Citizens has fallen far short of compliance with this obligation. Although specifying the issues it seeks to litigate, Citizens left the Licensing Board entirely in the dark respecting the identity of its proposed witnesses and the substance of the testimony they would offer. Even after the staff noted the absence of a "bill of particulars" on these matters and called Citizens' attention specifically to the Greenwood decision,[44] little further information was forthcoming -- Citizens apparently being content to rest on its mistaken belief that a prospective intervenor is not obligated to supply any greater detail on its intended contribution to the record. See p. 10, supra.

In the context of the present case, this failure on Citizens' part looms large. There well may be instances in which, absent the requisite detail in the petition, an inference nevertheless could be drawn that a tardy prospective intervenor likely will make a valuable contribution beyond that to be expected of existing parties. But this is not such an instance. As previously noted, if anything is to be assumed here, it is that the expert testimony adduced by the applicant will cover all aspects of its substitute offsite emergency response plan that have

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[44] Staff's Response to Citizens' Petition, fn. 21 supra, at 9-10.

been challenged by Suffolk County and the other intervenors. (Beyond doubt, the applicant has the technical and legal resources necessary to carry out that undertaking.) On that assumption, one might fairly question whether additional worthwhile evidence might be produced by an organization comprised of scientists who have not been shown to possess special expertise in the area of emergency response planning. In a word, if it has the capability to supplement significantly the applicant's presentation, Citizens was duty-bound to establish that fact.

In this regard, we are much less impressed than is our dissenting colleague by the fact (first brought to our attention by the applicant[45] rather than by Citizens) that some of Citizens' members participated in the Shoreham construction permit proceeding as members of another organization -- Suffolk Scientists for Cleaner Power and Safer Environment. For one thing, there is nothing before us that would permit the conclusion that Suffolk Scientists' participation in that proceeding made a substantial contribution to the development of the record. For another, the emergency planning issues that Citizens would litigate here bear no resemblance to any issue that might have confronted the Licensing Board in the construction permit

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[45] Applicant's Br. at 3.

proceeding. In these circumstances, it is small wonder that, even though aware that Citizens' members had participated in that proceeding, Citizens' counsel had perceived no reason to rely upon it.[46]

Our dissenting colleague also stresses that some of Citizens' members have participated in emergency planning drills in the northeastern United States and served as members of radiological emergency response teams. See p. 33, infra. Without further particularization respecting their roles in those activities, however, no informed judgment can be made regarding their specific ability to make a significant contribution in the exploration of the issues that will confront the Licensing Board. Insofar as concerns the Licensing Board grant of discretionary intervention to the Chicago Section of the American Nuclear Society several years ago in the Sheffield proceeding (dissenting opinion, fn. 4), it suffices to note that that

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[46] Indeed, counsel first told us that she deemed the participation of Citizens' members in the prior proceeding to be "not relevant to what we're trying to argue here." When our dissenting colleague then expressed his contrary opinion that "the fact that the members participated at an earlier stage and were apparently fairly effective is some indication at least that they are likely to be effective again," counsel understandably noted her agreement. Even then, however, she felt constrained to add that "[b]ut what we are trying to do in our petition is to demonstrate who our members were and what they could do here." App. Tr. 28-29; emphasis supplied.

grant was not accompanied by a reasoned analysis of the sufficiency of the Chicago Section's showing on its ability to contribute to the development of the record. This being so, it is not entitled to any precedential effect.[47]

Moreover, Citizens has failed to explain to our satisfaction why it needs intervenor status in order to make its contribution to the record (whatever that contribution might be). Presumably, the applicant would be more than willing to sponsor any expert testimony in favor of the substitute plan that Citizens might offer itself if admitted to the proceeding. To be sure, Citizens undoubtedly would prefer to have its experts testify as its witnesses rather than under the applicant's sponsorship. There is no reason to believe, however, that the weight attached by the Licensing Board to any testimony it might receive will be

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[47] At oral argument, Citizens' counsel indicated that Andrew P. Hull would serve as one of its witnesses. App. Tr. 33. Mr. Hull made a limited appearance statement in April 1982, in which his principal thesis was that the Commission's current emergency planning regulations "are excessive and lacking a technical basis from actual experience." See Tr. 971. That is, however, not a matter that the Licensing Board can consider in its determination of the adequacy of the substitute offsite emergency response plan. 10 CFR 2.758(a). If Mr. Hull's testimony on Citizens' behalf would lie in some other direction, the Licensing Board was not so informed.

influenced by the consideration that it was presented by one party rather than another.[48]

D. This brings us to the fifth and final factor -- that of the potential for delay. This factor, too, is of immense importance in the overall balancing process. See, e.g., Greenwood, ALAB-476, supra, 7 NRC at 761-62; Virginia Electric and Power Co. (North Anna Station, Units 1 and 2), ALAB-289, 2 NRC 395, 400 (1975).

Were it to be granted intervenor status, Citizens would of course have to take the proceeding as it finds it. West Valley, CLI-75-4, fn. 36 supra, 1 NRC at 276. At the same time, however, the other parties would be entitled to insist that the lateness of the intervention not work to their detriment. Among other things, those intervenors challenging the adequacy of the substitute offsite emergency response plan might not only insist upon discovery against

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[48] In the absence of intervenor status, Citizens would have no right to file proposed findings of fact and conclusions of law or to participate in any appellate proceedings. That, however, has no bearing upon the third factor, which is concerned with contributions to the evidentiary record. On the appellate level, of course, Citizens could seek leave to provide its unique "perspective" (see p. 8, supra) in an amicus curiae brief. See 10 CFR 2.715(d). (The Rules of Practice do not explicitly authorize amicus curiae filings with licensing boards and we do not decide here whether those boards nonetheless have the inherent power to accept such a filing if, in the board's judgment, it might aid the proper disposition of the proceeding.)

Citizens, but also resist successfully any endeavor either (1) to shorten the time period for its accomplishment or (2) to compel them to conduct discovery while the evidentiary hearing is already in progress on facets of the offsite emergency response planning issues that Citizens does not wish to address.[49]

As matters now stand, the hearing is to start on December 5, 1983 -- i.e., in approximately two months. There is therefore, at minimum, the potential for some measure of delay should Citizens be admitted as a party at this late date. We repeat here what we said many years ago in affirming the denial of the tardy intervention petition in North Anna, ALAB-289, supra:

> Even if the League [the late petitioner] were required to take the proceeding as it finds it, experience teaches that the admission of a new party just before a hearing starts is bound to confuse or complicate matters. And, even putting that to one side, delay can otherwise be avoided only if the parties adverse to the League forego important procedural rights, including the right to discovery. * * * It is scarcely equitable to give the League credit for not causing delay when that result could be achieved only because the

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[49] See App. Tr. 102. Our dissenting colleague implies (see pp. 41-42, infra) that any such resistance would necessarily be founded upon a desire to delay the proceeding. We think otherwise. An existing intervenor might have perfectly legitimate reasons for opposing the acceleration of discovery simply to accommodate an inexcusably late intervention petition. Similarly, that intervenor might well find its resources unduly strained if compelled to conduct discovery while the hearing was in progress.

> circumstances would coerce other parties into waiving substantial rights.

2 NRC at 400 (footnote omitted).

In sum, four of the five lateness factors weigh against Citizens' intervention. It accordingly follows that the Licensing Board justifiably denied the petition. Indeed, given the prior jurisprudence in this area, we think that any different outcome could have rested on no foundation other than the impermissible one that there is one test for untimely petitioners who would oppose the license application in contest and another, and more lenient, test for those who seek to support the application.[50]

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[50] We do not imply that our dissenting colleague is advocating the adoption of any such double standard. It is clear from his opinion that he is not; i.e., that he would have applied the five lateness factors in the same way had Citizens sought to intervene in opposition to Shoreham. Our difficulty with his suggested outcome of this appeal is that the factors have been misapplied by him.

The basis for that belief should be evident from what has been said in this opinion. We therefore do not extend its length still further by undertaking a point-by-point response to the dissent. Rather, we confine ourselves to one general observation. Permeating Mr. Edles' entire analysis of the lateness factors appears to be the premise that allowing those residing in the neighborhood of a nuclear facility to be directly involved in any adjudication concerning that facility far transcends in importance all other considerations. Our acceptance of that premise would be untenable. Apart from making a mockery of the intervention petition deadline that is included in every notice of hearing or opportunity for hearing, it would

(Footnote Continued)

The Licensing Board's July 28, 1983 order, LBP-83-42, 18 NRC ___, is affirmed.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

The dissenting opinion of Mr. Edles and the Appendix to this opinion follow, pp. 31-51, infra.

(Footnote Continued)
require the at least implicit overruling of the long line of precedents respecting late intervention. For, in marked contrast to the dissent's approach, no prior Commission or Appeal Board decision has strained to find justification for permitting one to enter a proceeding many years after it commenced and on the virtual eve of its concluding chapter. To the contrary, as even a cursory examination of the decisions cited in the Appendix, infra, will reflect, endeavors to achieve such a result have been viewed in a most unsympathetic light.

Opinion of Mr. Edles, dissenting:

This case is the first one in which the Commission will be called upon to decide whether a plant should be licensed in the absence of local government participation in the offsite emergency plan. Citizens for an Orderly Energy Policy, Inc. (Citizens), which is an organization made up of individuals who live near the Shoreham plant, some of whom work at the Brookhaven National Laboratory, seeks an opportunity to be heard on that novel issue.

The Licensing Board and my colleagues would keep Citizens out of the case because its petition is tardy, it has supposedly failed to set forth with satisfactory precision exactly who will testify and what they will testify about, and its involvement at this stage may give existing parties an opportunity to delay the proceeding. I think the petitioner has shown that it is likely to make a valuable contribution to the development of the record, with little delay in completion of the proceeding. I also think we know full well exactly what matters it is going to raise. Finally, I do not believe either that the petition is inexcusably tardy or that the petitioner's position can be adequately represented by the applicant. Thus, in weighing

and balancing the five lateness factors, I would exercise our discretion and allow Citizens to participate.[1]

The case law granting or denying late intervention petitions demonstrates that all five factors must be evaluated but that the contribution an intervenor is likely to make to the record and the delay likely to be caused by late intervention are the most significant. I turn to these first.

I

Citizens can be expected to make a valuable contribution to the record in this case. Given the unique nature of the issues in this case, moreover, its interest cannot be properly represented by the applicant. These matters are interrelated and must be considered together.

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[1] I agree with the majority that the five Section 2.714(a) factors are to be applied in the same manner in the evaluation of all tardy petitions, irrespective of whether the petitioner favors or opposes the licensing of a facility. I also recognize that neither this Board nor the Commission has been readily disposed to substitute its judgment for that of a licensing board insofar as the balancing of the five factors is concerned. I nonetheless believe that we have an obligation to take a somewhat closer look at a licensing board decision that has the effect of completely depriving individuals or groups of an opportunity to participate in Commission proceedings. Cf. 10 CFR 2.714a, which permits immediate appellate review of licensing board orders denying a petition to intervene or a request for hearing in its entirety.

The Licensing Board found that Citizens' statements concerning its ability to make a contribution were "vague and insufficient" and that, as a consequence, it had failed to establish that its intervention could be expected to assist in developing a sound record.[2] My colleagues are of the same view. In my judgment, the petitioner has established to a sufficient degree that it can contribute to the development of the issues it seeks to litigate.

According to the petition to intervene, most of Citizens' members have experience in the field of nuclear power. Some of its members, in fact, work professionally in radiological emergency planning, including having participated in emergency planning drills in the northeastern United States and serving as members of federal radiological emergency response teams.[3] Such expertise in the area of nuclear technology appears to be precisely the type of informational foundation upon which the Chicago Section of the American Nuclear Society was permitted to intervene on a discretionary basis following our remand in the Sheffield case.[4] Moreover, the contentions of existing

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[2] LBP-83-42, 18 NRC ___ (July 28, 1983) (slip opinion at 11).

[3] Citizens' Petition (June 14, 1982) at 8.

[4] See Licensing Board Order Granting Further Request
(Footnote Continued)

intervenors now admitted into litigation (45, 46, and 48 through 51)[5] deal generally with accident and dose assessment and projection, and specifically with the role of Brookhaven National Laboratory personnel in making and communicating those assessments and projections. Obviously the nuclear and health physicists who work at Brookhaven and are members of Citizens are likely to be knowledgeable and helpful participants on those matters.

Citizens' specific interest in developing these issues is clearly revealed in its filings. Its three proposed contentions make the following interrelated arguments. First, Suffolk County's existing civil defense plan can easily be modified to make it applicable to radiological emergencies. Citizens indicates that it will show, in this

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(Footnote Continued)
for Leave to Intervene as a Matter of Discretion by the Chicago Section, American Nuclear Society (June 20, 1978) (unpublished), cited in Nuclear Engineering Co., Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), ALAB-494, 8 NRC 299, 300 n.1 (1978). See also Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-397, 5 NRC 1143, 1148 (1977), request for reconsideration denied, ALAB-402, 5 NRC 1182 (1977), where we agreed with a licensing board that an individual possessing a PhD in nuclear engineering, several years experience as a reactor engineer, principally in naval service, and additional knowledge gained as an academic researcher in the field of reactor safety, could make a valuable contribution on the issue of whether a plant had sufficient structural integrity and safety redundancy to thwart a saboteur.

[5] See Licensing Board Special Prehearing Conference Order (August 19, 1983) at 19.

connection, that Suffolk County is wrong when it claims that no emergency plan can be developed. Second, an emergency response volunteer force is available on Long Island, including many qualified staff members of the Brookhaven National Laboratory. Citizens intends to show, in this regard, that the inference by Suffolk County officials that these volunteer units would fail to perform assigned emergency duties is unfounded. Third, Citizens states that it will develop testimony and otherwise litigate the issue of LILCO's ability to rely on personnel from Brookhaven National Laboratory in case of emergency.[6]

We must also bear in mind that Citizens' members, in addition to being scientists, are local residents who are neighbors of the proposed Shoreham plant. In the usual case, governmental representatives participate in support of their own emergency plan and local residents routinely offer their conflicting views or perspectives. In the instant case, we are confronted with the opposite situation -- a refusal by the local government to participate in emergency planning. I do not understand why the conflicting views or perspectives of local citizens are likely to be less helpful here.

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[6] See Draft Contentions Submitted by the Citizens for an Orderly Energy Policy, Inc. (June 22, 1983). Citizens

(Footnote Continued)

Indeed, this case is a particularly compelling one for entertaining opposing citizen viewpoints. It appears that approximately 70 contentions or subcontentions have already been admitted for litigation.[7] Central to many of the issues raised by those contentions is the argument that the public will not accept LILCO standing in the shoes of local authorities in implementing an emergency plan. Contention 15, as admitted, is illustrative:

> Contention 15. Intervenors contend that LILCO is not considered by the public to be a credible source of information. More than 60 percent of the people in Suffolk County would not trust LILCO officials at all to tell the truth about an accident . . . Persons are more likely to question, refuse to believe, disobey or ignore orders, recommendations, or information that come from persons whom they do not believe than that from authorities they trust and consider credible.
>
> Because the public does not perceive LILCO as a credible source of information, protective action recommendations and other information disseminated by LILCO in an emergency will not be followed or believed by the public. Further, LILCO may be viewed hostilely as the source of the problem in the first place, or skeptically because the public will perceive that it is not in LILCO's financial interest to disclose all pertinent information. (Members of the public will perceive that LILCO will not disclose the seriousness of an accident due to fears of lower ratings in the financial markets, NRC sanctions, or a lower public image than already exists.) Therefore, people will be likely to disregard or disobey protective action recommendations or other emergency instructions

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(Footnote Continued)
originally proposed five contentions. It indicated at oral argument that it would abandon two of them. See App. Tr. 33.

[7] See Special Prehearing Conference Order, note 5, supra.

> disseminated by LILCO during an emergency. Intervenors thus contend that the LILCO Plan cannot and will not be implemented, and accordingly, there can be no finding of compliance with 10 CFR Section 50.47. . . .[8]

Citizens' members, as local residents, can be expected to offer a viewpoint on this type of issue, and ask questions on cross-examination designed to elicit information, that would not likely be forthcoming in precisely the same fashion in the absence of their participation.

Local community and governmental advocates addressing one side of a novel and controversial issue have been permitted to intervene in this case, one as recently as March of this year. I would certainly think the record will benefit from participation by community members representing the other side. Given the fundamental thesis of many of the issues the opposing intervenors specifically seek to litigate, the participation of local residents at the hearing under the sponsorship of the applicant simply cannot serve as an effective substitute for their independent representation.

Finally, as the majority notes, some of Citizens' members were also members of Suffolk Scientists for Cleaner Power and Safer Environment, which intervened in the construction phase of this case -- a matter unfortunately

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[8] See Revised Emergency Planning Contentions (filed jointly by all intervenors) (July 26, 1983) at 19-20 and Special Prehearing Conference Order, note 5, supra, at 6.

not brought to the Licensing Board's attention and, thus, not considered by it, but of which we may obviously take notice.[9] Suffolk Scientists attended the earlier sessions, presented evidence, conducted cross-examination, and was commended by the Licensing Board in the earlier proceeding "for the diligence . . . [it] displayed in pleading . . . [its case.]"[10] Although the two organizations are not identical, Citizens' members have a track record that lends additional support to their claim that they are likely to make a serious contribution to the development of the record.

II

Admission of Citizens to the case is not likely to broaden the issues or delay the proceeding appreciably. To begin with, neither the Licensing Board nor my colleagues find that a grant of Citizens' participation would broaden the issues, and clearly it will not. The Licensing Board did find, however, that Citizens' intervention could cause delay, and my colleagues agree. I disagree with the approach the Licensing Board and the majority take

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[9] Dr. Vance L. Sailor, for example, is a member of Citizens and was chairman of Suffolk Scientists.

[10] Long Island Lighting Co. (Shoreham Nuclear Power Station, LBP-73-13, 6 AEC 271, 274-75, 306 (1973).

regarding the factor of delay. I also disagree with the inferences they draw from the facts.

As a threshold matter, I am uncomfortable with the majority's apparent conclusion that Citizens' burden is a particularly heavy one in the context of this case. Citizens is, even by the majority's reckoning, only four months late. Moreover, Citizens sought to intervene before emergency planning contentions had been filed. As we pointed out in our Greenwood decision:

> Manifestly, the later the petition, the greater the potential that the petitioner's participation will drag out the proceeding.[11] (emphasis added)

In other words, time lag is important only insofar as it increases the likelihood of delay. To the degree that my colleagues appear to attach independent significance to the length of time by which Citizens' petition is late without regard to the impact of that tardiness on the current posture of the case, their approach is inconsistent with Greenwood.[12]

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[11] LBP-83-42, 18 NRC ___ (slip opinion at 12), quoting Detroit Edison Co. (Greenwood Energy Center, Units 2 and 3), ALAB-476, 7 NRC 759, 762 (1978).

[12] The majority, purportedly by way of dictum, alludes to the fact that Citizens had a "stake in the outcome" of the proceeding as early as 1976, see p. 18, supra, so that the Suffolk County announcement "simply added a new dimension to the emergency planning issue that had long been an ingredient of the proceeding that commenced in

(Footnote Continued)

In my view, there must be some individualized application of the potential for delay to the facts of the case at hand. On the facts before us, it is highly unlikely that significant delay will occur. To begin with, as even the staff acknowledges, Citizens has no incentive for delay.[13] In any event, Citizens is obliged to accommodate the needs of other parties in order to expedite the case. Furthermore, the emergency planning phase of the case is still at a relatively early stage. When Citizens originally filed its request, only informal discovery was taking place. The intervention petition was filed before the deadline for

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(Footnote Continued)
1976." See p. 16, supra. They also refer to Citizens' request as seeking to "enter a proceeding many years after it commenced. . . ." See note 50, supra. If the majority is implying that Citizens' burden of gaining entry is greater because it had a cognizable interest in the outcome of the case as early as 1976 requiring it to seek to intervene at that stage, I disagree. The 1976 date is irrelevant to determining good cause. As the Commission recently observed, "recent events may be a factor in establishing 'good cause,'" Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC ___ (September 22, 1983) (slip opinion at 4), and the Licensing Board quite properly considered Citizens' request in the context of the Catawba decisions dealing with the formulation of contentions based on newly discovered information. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460 (1982), reversed in part, CLI-83-19, 17 NRC ___ (June 30, 1983). This is not a situation where a litigant "slept on its rights." Citizens could not have reasonably foreseen in 1976 that the special facts it now seeks to litigate would have arisen during the course of the case.

[13] NRC Staff Brief in Opposition to Citizens' Appeal (August 24, 1983) at 11.

submitting contentions concerning offsite emergency planning, and Citizens' proposed contentions were submitted at the same time as all other contentions. The pendency of this appeal has necessarily delayed entry of Citizens into the case but discovery is still in progress and will not be completed until October 14. The hearing will not begin until December 5[14] and Citizens has agreed to comply with all procedural time limits.

A second prong of my colleagues' argument regarding delay is that Citizens' introduction into the case at this stage might trigger requests for discovery by other parties. I agree fully that Citizens' participation would inject the possibility -- although not the inevitability -- that some delay may occur.[15] I am not prepared to assume, however, either that existing parties would use the fact of Citizens' late intervention as an excuse to engage in dilatory tactics or that the Licensing Board would prove incapable of controlling inexcusable or unnecessary delay. I also think that it is a bad precedent to suggest that we accord

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[14] See Revised Special Prehearing Conference Order of August 30, 1983, at 2-3 (unpublished).

[15] At oral argument, LILCO's counsel suggested that over the course of this proceeding discovery has gone on while hearings were also being conducted. App. Tr. 102. Such an approach might be successful if discovery of Citizens' witnesses is desired.

existing parties a de facto veto right over late intervention requests based on the specter that they will utilize the fact of such intervention as an excuse for delay.

In any event, I have no reason to believe that any delay will be significant. Citizens seeks to litigate only three contentions and will apparently present only two witnesses. Some additional discovery of these witnesses may be required but there has been no demonstration that such discovery need be disruptive. There are already six participants involved in the case, litigating 70 contentions or subcontentions, and the staff indicates that "the hearing is already anticipated to be a very long one."[16] In my judgment, any incremental delay associated with Citizens' participation is likely to be slight. Indeed, the applicant, which has the most to lose in the event of untoward delay, seems prepared to accommodate any extension that may ensue as a result of Citizens' intervention.[17]

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[16] NRC Staff Brief at 11.

[17] The Licensing Board found that there were no other means by which Citizens could protect its interest but accorded little weight to this factor in the balancing process. It also found that Citizens had failed to establish that LILCO could not represent its interests, a finding with which I disagree. To the extent these factors are considered in the balance, they weigh in favor of intervention.

III

Citizens' failure to intervene earlier does not warrant a denial of its petition in light of the important public benefits likely to accrue from intervention. To be sure, the original Federal Register notice in this proceeding required the filing of intervention requests in 1976. At that time, however, NRC approval of state or local emergency plans was not a condition of nuclear power plant licensing. It was only in July of 1979, in the wake of the accident at Three Mile Island, that the Commission even began to examine the need for emergency plans as a condition for issuing a license.[18] The first set of regulations establishing mandatory emergency planning requirements became effective on November 3, 1980.[19] It seems clear, therefore, that a request to intervene to address such new emergency planning issues would not have been rejected as late had it been submitted in 1980.

Moreover, as my colleagues concede for decisional purposes, the ramifications of the emergency planning issues

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[18] See 44 Fed. Reg. 41483 (1979). The July 17, 1979 issuance was an advance notice of proposed rulemaking which asked such fundamental and threshold questions as "What should be the basic objectives of emergency planning. . . To what extent should these objectives be quantified. . . (and) What constitutes an effective emergency response plan for State and local agencies. . .?"

[19] See 45 Fed. Reg. 55402 (1980).

in this case changed dramatically with Suffolk County's announcement in February of this year that it no longer intended to support the emergency plan.[20] Thus, just like the Licensing Board, they start the clock running in February, 1983, for the purpose of determining "good cause," and find that Citizens is essentially only four months late.

I am not convinced that February 1983 is the proper starting point for considering whether Citizens has established good cause for filing late. The filing of Suffolk County's motion genuinely called into question whether or not any hearing on emergency planning issues was even likely to take place. The Licensing Board ruled on the motion on April 20, 1983, concluding that the case could proceed in the absence of a governmentally-approved emergency plan. The Board nevertheless recognized that the issue was a novel one and that the Commission's regulations and underlying legislation might dictate an opposite result. Accordingly, it referred the matter to the Appeal Board, and Chairman Rosenthal, acting in his capacity as chairman of the Panel, referred it directly to the Commission for disposition.[21] The Commission decided, on May 12, 1983,

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[20] See p. 19, supra.

[21] See LBP-83-21, 17 NRC ___ (April 20, 1983) and Appeal Panel Chairman's Order of April 26, 1983 (unpublished).

that the case could go forward, and LILCO submitted its alternate emergency plan on May 26. Citizens' petition was filed on June 14. Plainly questions regarding whether or not a hearing would be held were not resolved until the Commission's May 12 decision, and Citizens could not reasonably have been expected to take a position for or against the adequacy of the applicant's plan until some time after it was first made available for public review on May 26. In my judgment, Citizens' petition to intervene was tendered with the requisite degree of promptness.

IV

One additional matter tilts the balance in favor of intervention in this case. My colleagues decline specifically either to address Citizens' right to intervene in this proceeding or to determine whether intervention is warranted as a matter of discretion. They believe the case can be decided on the independent issue of lateness.

I view this matter somewhat differently. I agree with my colleagues that issues not necessary to decisions ordinarily should not be reached on appeal.[22] In the

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[22] See the majority opinion in Armed Forces Radiobiology Research Institute (Cobalt-60 Storage Facility), ALAB-682, 16 NRC 150, 155 (1982), in which I joined, and my separate opinion in Metropolitan Edison Co.

(Footnote Continued)

instant case, however, my conclusion that Citizens should be allowed to intervene late is colored by a judgment that they should be permitted to participate either because they have standing or, if not, as an exercise of administrative discretion. In other words, if I were convinced that Citizens should not be allowed to intervene, I would be more willing simply to join with my colleagues in dismissing Citizens' petition as late. (This may also be an implicit factor in the majority's decision. In any event, I find it difficult to divorce the two issues.) As a result, and unlike my colleagues, I must set out a few brief observations on the issue of standing and discretionary intervention.

Generally speaking, the Commission applies the test of standing enunciated by the courts.[23] The Commission's precedent has evolved essentially in the context of individuals or groups opposing applications.[24] As far as I

(Footnote Continued)
(Three Mile Island Nuclear Station, Unit No. 1), ALAB-698, 16 NRC 1290, 1323 (1982), reversed, CLI-83-22, 18 NRC ___ (September 8, 1983).

[23] Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976).

[24] See, e.g., Ten Applications for Low-Enriched Uranium Exports to EURATOM Member Nations, CLI-77-24, 6 NRC 525, 529 (1977); Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420 (1976); Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-292, 2 NRC 631 (1975).

am aware, we have been called upon only once -- in the Sheffield case -- to address the question of the standing of a group seeking to support an application. Our opinion in that case indicated that the same test should be applied whether prospective intervenors support or oppose the grant. Although I find it unnecessary to decide whether or not Citizens has standing to intervene, it seems to me that the facially neutral principle announced in Sheffield may have the practical effect of routinely excluding one segment of the public, i.e., individuals or groups favoring the grant of applications, from presenting their views on health or safety matters unless we adopt a hospitable attitude toward intervention as a matter of administrative discretion.

Strict application of the judicial standards to administrative proceedings is not required by statute or the Constitution.[25] The approach has been used by the Commission for somewhat the same reason that it has been employed by the courts, i.e., to guarantee that the decisional process "benefits from the concrete adverseness brought to a proceeding by a party who may suffer injury in fact by Commission licensing action . . . ."[26] Moreover,

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[25] See Koniag, Inc., Village of Uyak v. Andrus, 580 F.2d 601 (D.C. Cir.) cert. denied, 493 U.S. 1052 (1978). Pebble Springs, note 23, supra, 4 NRC at 613.

[26] Pebble Springs, note 23, supra, 4 NRC at 613.

the standing test as applied by the courts is calculated in part to ensure that the federal judiciary will not become a forum for deciding "abstract questions of wide public significance . . . [where] other governmental institutions may be more competent to address the questions and . . . judicial intervention may be unnecessary to protect individual rights."[27] In considering the related questions of standing and discretionary intervention, we should not overlook those underlying purposes.

It is clear that Citizens is in the right forum and does not seek to litigate an abstract question. Its interests cannot be protected elsewhere. It seems to me, therefore, that the purposes of the Commission's standing precedent will be better served by grant of Citizens' petition than by denial.

V

In retrospect, it might have been preferable had Citizens sought to enter the proceeding at the time Suffolk County filed its motion. In its brief Citizens suggests that it did not seek to intervene at that time because it was unclear whether or not any hearing on the license

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[27] Warth v. Seldin, 422 U.S. 490, 500 (1975).

application would in fact take place.[28] We have held that it is primarily an intervenor's contribution to the evidentiary record, rather than its views on legal issues, that are determinative when considering petitions to intervene late.[29] The issues before the Licensing Board and the Commission in connection with Suffolk County's motion were purely legal. It was not entirely unreasonable, therefore, for Citizens to have awaited the outcome of the Commission's deliberations, and the filing of the LILCO plan, before seeking to participate in the case.

In any event, the failure even to establish good cause for late intervention does not foreclose the possibility of intervention altogether.[30] Given my view that Citizens can be expected to participate constructively in developing the record on a unique issue of first impression, and can do so with only minimal delay, I would, on balance, grant the petition to intervene.

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[28] Citizens' Brief at 5.

[29] Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-671, 15 NRC 508, 513 n.14 (1982).

[30] Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273 (1975); Virginia Electric and Power Co. (North Anna Station, Units 1 and 2), ALAB-289, 2 NRC 395, 398 (1975).

APPENDIX

Appellate decisions on licensing board action granting or denying late-filed petitions for leave to intervene under 10 CFR 2.714(a)

A. Decisions in which an appeal board or the Commission affirmed a licensing board's denial of a late-filed petition to intervene:

1. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760 (1982).

2. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725 (1982).

3. Houston Lighting and Power Co. (Allens Creek Generating Station, Unit 1), ALAB-671, 15 NRC 508 (1982).

4. Puget Sound Power and Light Co. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-559, 10 NRC 162 (1979).

5. Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-526, 9 NRC 122 (1979).

6. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-431, 6 NRC 460 (1977).

7. Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-440, 6 NRC 642 (1977).

8. Tennessee Valley Authority (Browns Ferry Units 1 and 2), ALAB-341, 4 NRC 95 (1976).

9. Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383 (1976).

10. Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-292, 2 NRC 631 (1975).

11. Virginia Electric and Power Co. (North Anna Station, Units 1 and 2), ALAB-289, 2 NRC 395 (1975).

12. Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), ALAB-238, 8 AEC 656 (1974).

13. Duquesne Light Co. (Beaver Valley Power Station, Unit 2), ALAB-208, 7 AEC 959 (1974).

14. Iowa Electric Light & Power Co. (Duane Arnold Energy Center), ALAB-108, 6 AEC 195 (1973).

B. Decision in which an appeal board or the Commission reversed a licensing board's denial of a late-filed petition to intervene:

1. Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273 (1975).

C. Decisions in which an appeal board or the Commission affirmed a licensing board's granting of a late-filed petition to intervene:

1. Detroit Edison Co. (Greenwood Energy Center, Units 2 and 3), ALAB-476, 7 NRC 759 (1978).

2. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-420, 6 NRC 8 (1977), affirmed, CLI-78-12, 7 NRC 939 (1978).

3. Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98 (1976).

4. Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-339, 4 NRC 20 (1976).

5. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-223, 8 AEC 241 (1974).

D. Decisions in which an appeal board or the Commission reversed a licensing board's granting of a late-filed petition to intervene:

1. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881 (1981).

2. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 2), ALAB-384, 5 NRC 612 (1977).