

'91 DEC 12 P12:46

December 10, 1991

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

ARIZONA PUBLIC SERVICE
COMPANY, et al.

(Palo Verde Nuclear Generating
Station, Units 1, 2, and 3)

Nos. 50-528-OLA, 50-529-OLA
and 50-530-OLA -3

(Shutdown Cooling Valve)

LICENSEES' ANSWER IN OPPOSITION
TO PETITION FOR LEAVE TO
INTERVENE AND REQUEST FOR HEARING

Arizona Public Service Company, et al. ("APS" or "Licensees") 1/ file this Answer in opposition to the "Petition for Leave to Intervene and Request for Hearing" submitted by Allan L. Mitchell and Linda E. Mitchell and bearing the date November 25, 1991 ("Petition"). The Petition relates to a proposed amendment to each of the operating licenses 2/ for the three Palo Verde units which was noticed in the Federal Register at 56 Fed. Reg. 55,940, 55,942 (1991). The amendment request was

- 1/ This Answer is being filed by APS on its own behalf and on behalf of the other licensees of the Palo Verde Nuclear Generating Station ("PVNGS"), Units 1, 2 and 3: Salt River Project Agricultural Improvement and Power District, El Paso Service Company of New Mexico, Los Angeles Department of Water and Power, and Southern California Public Power Authority.
- 2/ For PVNGS Unit 1, Facility Operating License No. NPF-41; for PVNGS Unit 2, Facility Operating License No. NPF-51; and for PVNGS Unit 3, Facility Operating License No. NPF-74.

submitted to implement a programmed enhancement identified in APS's response to Generic Letter No. 88-17, "Loss of Decay Heat Removal" (Oct. 17, 1988), which recommends further enhancements to procedures, programs, and Technical Specifications regarding loss of the shutdown cooling system. 3/ Each proposed amendment would result in

remov[al] of the automatic closure interlock (ACI) for the shutdown cooling valves to make the shutdown cooling system more reliable. Accordingly, the technical specifications would be revised to delete the surveillance requirement for this interlock.

56 Fed. Reg. at 55,942; see also Sept. 9, 1991 Letter.

The Federal Register Notice of the proposed amendment clearly states that anyone seeking to intervene in the instant proceeding must comply with 10 C.F.R. § 2.714 (1991). 56 Fed. Reg. at 55,941. As the notice states, 10 C.F.R. § 2.714 (1991) requires that a petition for leave to intervene

shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why

3/ The proposed amendment is one of two potential license amendments to reduce the risk of loss of shutdown cooling events that were identified in APS's January 6, 1989 response to Generic Letter 88-17. See September 9, 1991 letter to the Nuclear Regulatory Commission from APS requesting the current amendment, and Reference 1 to that request, constituting a letter to the Commission from APS dated January 6, 1989. Petitioners Allan and Linda Mitchell also requested a hearing on the other potential amendment, however they subsequently withdrew that request without identifying any contentions. See Arizona Public Service Co., et al. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-20, 33 N.R.C. 416 (1991).

intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene.

56 Fed. Reg. at 55,941 (emphasis added).

Petitioners may have shown the plausibility of their having an affected interest by virtue of residence in proximity to PVNGS and the employment of one of them at the plant. Therefore, we do not challenge Petitioners' standing to intervene. 4/ However, § 2.714(a)(2) expressly requires that a petition to intervene set forth "the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene." Although, the burden is on Petitioners to satisfy this requirement, 10 CFR § 2.732 (1991); Metropolitan Edison Co. et al. (Three Mile Island Nuclear Station, Unit No. 1), CLI-83-25, 18 N.R.C. 327,331 (1983), they have not met it. Consequently, Licensees submit, the Petition should be denied.

4/ Petitioners previously established their standing to intervene in an operating license amendment proceeding related to Palo Verde in Arizona Public Service Co., et al. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-4, 33 N.R.C. 153 (1991) (Allowable Setpoint Tolerance). Factors identical to those relied on in the above captioned proceeding are relied upon to support standing here.

The Petition merely states, without describing the proposed amendment in any way or indicating any changes the Licensees seek, that

Petitioners intend to intervene in all aspects of the proceeding set forth in the Federal Register notice and all aspects as set forth by the list of contentions which will be submitted by Petitioners upon their filing of an amended or supplemental petition in accordance with the intervention rule.

Petition at 3.

As was stated in Licensees' Answer in Opposition to Petitions for Leave to Intervene and Requests for Hearing in the proceeding in which LBP-91-4 was issued, "[t]here is little guidance in NRC case law concerning the meaning of 'aspect' as the term is used in 10 CFR § 2.714." (quoting Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-90-6, 31 N.R.C. 85, 89 (1990)). It has been suggested "that an 'aspect' is probably broader than a 'contention' but narrower than a general reference to our operating statutes." Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-78-27, 8 N.R.C. 275, 278 (1978). However, at a minimum, the requirement that the petitioner set forth a specific aspect or specific aspects of the proceeding must mean that the petitioner has an obligation to identify "general potential effects of the licensing action or areas of concern that are within the scope of matters that may be considered in the proceeding," e.g., aging of equipment, Vermont Yankee, LBP-90-6, 31 N.R.C. at 89-90; the applicant's qualifications to construct a reactor, Virginia Electric & Power Co. (North Anna

Power Station, Units 1 and 2), ALAB-146, 6 A.E.C. 631, 633 (1973); or the effects of time extensions for testing instrumentation lines, Philadelphia Electric Co. (Limerick Generating Station, Unit 1), LBP-86-6A, 23 N.R.C. 165, 169-70 (1986). The Petition fails to meet this requirement.

The failure of the Petition to meet the aspect requirement of 10 C.F.R. § 2.714 is not a mere technical flaw. The objective of the aspect requirement of § 2.714 is to provide early notice to the NRC Staff and Licensees as to the area(s) of the proposed amendment that petitioners wish to intervene in where, as here, more than one possible area exists. This requirement is liberal and permissive and does not operate as an obstacle to participation in the licensing process by truly interested members of the public with legally cognizable interests. Correlatively, the aspect requirement may serve to prevent the unnecessary initiation of expensive, time-consuming and diversionary burdens both upon licensees and the Commission.

We are, of course, aware that, in LBP-91-4, the Licensing Board rejected a similar challenge, made by both the Licensees and the NRC Staff and based upon Petitioners' failure to meet the aspect requirement. In that proceeding, like the present one, the Mitchells filed a petition to intervene, substantially similar to Petitioners' present petition. One of the grounds on which Licensees and the Staff sought to have that petition denied was that it did not meet the aspect requirement of 10 CFR § 2.714(a)(2). As in their present petition, the

Mitchells' petition in the previous proceeding did not set forth specific aspects of the amendment that they wished to challenge. In rejecting the arguments made by the Licensees and the Staff, the Board in LBP-91-4 stated:

The Board believes that the objection is misdirected in this case. Section 2.714 is the general intervention rule controlling intervention in all proceedings under Subpart G. Thus, in a full-scope operating license proceeding, for example, petitioners might be expected to explain that they wish to intervene in, say, the ingestion-pathway emergency planning aspects, or perhaps financial qualifications, or management competence, or whatever broad category of interest concerns them.

In this proceeding the aspects of the operating license proposed for amendment are already clearly set out in the Federal Register notice. Simply by petitioning to intervene, a person whose interest may be affected by the proceeding has indicated the aspects as to which that person wishes to intervene. Petitioners need not be more particular until they file their list of contentions. Most important, the Licensees and the NRC Staff are well informed by early notice what any proceeding on the proposed amendments would be about.

33 N.R.C. at 159.

This language could conceivably be read as intending to effectively eliminate the aspect requirement from all operating license amendment proceedings. If that is now the law, the instant petition is admissible. However, Licensees respectfully submit that is not the law and such an interpretation of § 2.714 should be rejected.

We point out that the holding in LBP-91-4 was not addressed by the Commission on review. That interlocutory order was superseded by Petitioners subsequent filing of a Supplemental Petition containing the contentions Petitioners sought to have litigated. Consequently, the Commission only addressed the validity of the bases of Petitioners' contentions, and did not address the aspect requirement issue, in the Commission's denial of Licensee's appeal of the Board's memorandum and order granting the Mitchells' petition for leave to intervene and request for hearing. Arizona Public Service Company, et al. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CL1-91-12, 34 N.R.C. 149 (1991). Thus, if the Board that issued LBP-91-4 intended to read the aspect requirement out of operating license amendment proceedings, it is not binding precedent. 5/ It should not be adhered to here.

Section 2.714(a)(2) is the general intervention rule controlling intervention in all proceedings under Subpart G. Operating license amendment proceedings are within the scope of Subpart G. This is a petition for intervention into an operating license amendment proceeding. Therefore, the Petition must comply with the requirements, including the aspect requirement,

5/ A licensing board order that was never appealed is not entitled to any stare decisis effect. See Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 1), ALAB-893, 27 N.R.C. 627, 629 n.5 (1988); Arizona Public Service Co. (Palo Verde Nuclear Generating Stations, Units 1, 2 and 3), ALAB-713, 17 N.R.C. 83, 85 (1983); Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-482, 7 N.R.C. 979, 981 n.4 (1978).

of § 2.714(a)(2), and a Licensing Board may not simply eliminate a requirement imposed by regulation. Moreover, as pointed out above, the aspect requirement continues to serve a useful purpose in operating license amendment proceedings.

We believe that, rather than intending to read the aspect requirement of § 2.714 out of operating license amendment proceedings, the Licensing Board that issued LBP-91-4 was merely holding that, because of the special nature of the amendment there involved, the Federal Register notice was sufficient to identify the aspects of the amendment application which the Petitioners wished to address, and that any further reference to aspects in the petition to intervene would be merely redundant. If that is so, this proceeding is clearly distinguishable. Here, Petitioners state that they intend to intervene in "all aspects of the proceeding set forth in the Federal Register notice" and allege that "the amendment request involves significant hazards considerations." Petition at 3. This language clearly indicates that Petitioners recognize that there is more than one possible aspect of the proceeding that an intervenor could be concerned with. Nevertheless, Petitioners suggest only one specific aspect, Staff's determination that the amendment requests involve no significant hazards considerations, 6/ and leave the

6/ However, a licensing board lacks jurisdiction to consider whether Staff's no significant hazards considerations determination was erroneous. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-89-15, 29 N.R.C. 493, 500 (1989); Florida Power & Light Co. (continued...)

Commission and Licensees to guess at the others.

The statement that "all aspects" will be the subject of intervention provides no more indication of the "general potential effects of the licensing action or areas of concern that are within the scope of matters that may be considered in the proceeding", Vermont Yankee, LBP-90-6, 31 N.R.C. at 89-90, than does no language addressing aspects. "All aspects" would only be meaningful if all possible concerns were obvious from the Federal Register Notice and no two persons could reasonably differ in identifying these concerns. This is not the case here. One cannot ascertain from the Federal Register Notice the specific aspects of the requested amendments that Petitioners wish to address. 2/ Additionally, as pointed out above, there is one possible aspect that Petitioners have referred to, Staff's

5/(...continued)

(St. Lucie Nuclear Power Plant, Unit 1), LBP-88-10A, 27 N.R.C. 452, 456-57 (1988); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-17, 25 NRC 830, 844 (1987). Staff's determination of no significant hazards considerations is final and there is no right to appeal this determination to any body within the agency. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2, CLI-86-12, 24 N.R.C. 1, 4, rev'd in part on other grounds, sub nom San Luis Obispo Mothers for Peace v. NRC, 799 F.2d 1268 (9th Cir. 1986).

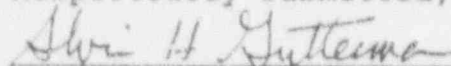
- 2/ Aside from the invalid no significant hazards considerations aspect suggested by Petitioners, Licensees have identified two possible aspects that Petitioners may wish to address: (1) the removal of the ACI and (2) the deletion of the surveillance requirement for this interlock. However, because Petitioners have not set out the aspects of the proposed amendment that they wish to address, as required by section 2.714, Licensees do not know whether either of these aspects are included in Petitioners' reference to "all aspects."

determination that the amendment requests involve no significant hazards consideration, is not a matter that may be considered in this proceeding. This reference to such an invalid aspect underscores the need for Petitioners to meet the aspect requirement prior to the initiation of proceedings and the related expenditure of resources which may be wholly wasteful. However, nowhere in the Petition can any valid aspects be discerned. It is therefore possible that none exist.

Here, the Licensees have requested an operating license amendment involving a significantly different technical subject than those which the Licensing Board addressed in LBP-91-4. Petitioners have, however, employed nearly identical, rote language in their previous and present Petitions. Petitioners have again wholly ignored the subject matter of the requested amendment, and have attempted to initiate a hearing without advising either the Commission or the Licensees of the nature of their concerns.

Accordingly, the Petition should be denied.

Respectfully submitted,



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DOCKETING & SERVICE
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CERTIFICATE OF SERVICE

I hereby certify that copies of "Licensees' Answer in Opposition to Petition for Leave to Intervene and Request for Hearing" in the above captioned proceeding, together with two "Notice[s] of Appearance of Counsel," were served on the following by deposit in the United States mail, first class, properly stamped and addressed, on the date shown below.

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Adjudicatory File
Washington, D.C. 20555
(two copies)

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Attention: Chief, Docketing and Service Section
(Original plus two copies)

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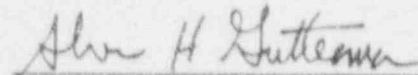
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Station, Units 1, 2, and 3))	
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NOTICE OF APPEARANCE OF COUNSEL

Notice is hereby given that Alvin H. Gutterman enters an appearance as counsel for Arizona Public Service Company, et al. in the above-captioned proceeding.

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NOTICE OF APPEARANCE OF COUNSEL

Notice is hereby given that Deborah A. Moss enters an appearance as counsel for Arizona Public Service Company, et al. in the above-captioned proceeding.


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