

April 23, 1986
RECEIVED
USNRC

'86 APR 24 10:58

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

SECRETARY
SERVICE

Before the Administrative Judge

In the Matter of)
)
TOLEDO EDISON COMPANY, et al.) Docket No. 50-346-ML
)
(Davis-Besse Nuclear Power)
Station, Unit No. 1))

LICENSEE'S RESPONSE OPPOSING THE PETITION
OF THE CITY OF ASHTABULA
FOR LEAVE TO INTERVENE

The Toledo Edison Company et al. ("Licensee") hereby responds to undated, unsigned petition of the City of Ashtabula, Ohio, for leave to intervene. Licensee submits that this petition should be denied, but does not object to treating the petition as a limited appearance statement.

I. Introduction

This proceeding involves the authorization which the Nuclear Regulatory Commission granted to the Licensee to bury very low-level radioactive waste at the Davis-Besse site. The waste in question is resin from the Davis-Besse plant's

DS03

secondary system demineralizer. Approval of Licensee's proposal was sought in accordance with 10 C.F.R. § 20.302(a) and IE Information Notice No. 83-05 (February 24, 1983), and was granted by the Nuclear Regulatory Commission in October, 1985.

Subsequent to this approval, several individuals and organizations requested a hearing. On February 20, 1986, the Commission instituted an informal proceeding upon these requests. Commission Order (February 20, 1986). The Commission stated that the petitions to intervene

must set forth with particularity (1) the interest of that person in the proceeding; (2) how that interest may be affected by the results of the proceeding, including a delineation of the reasons why that person should be permitted to intervene that makes particular reference to (a) the nature of the person's right under the Atomic Energy Act to be made a party, (b) the nature and extent of the person's property, financial, or other interest in the proceeding, and (c) the possible effect of any order that may be entered in the proceeding on the person's interest; and (3) the specific aspect or aspects of the subject matter of the proceeding that the person seeks to have litigated.

Id. at 3. The Commission further stated that the standing of petitioners to intervene will be governed by existing NRC precedents under 10 C.F.R. § 2.714(d). Id. at 4.

On March 10, 1986, the Presiding Officer issued a Memorandum and Order providing notice of the informal proceeding and opportunity to become a party. 51 Fed. Reg. 8,920 (1986). The

Order reiterated the pleading requirements that were set forth in the Commission's February 20, 1986 Order, and further provided:

. . . [P]etitioners are to describe specifically any deficiencies in the application, cite particular sections or portions of the application which relate to the deficiency, and state in detail the reasons why a particular section or portion of the application is deficient. Petitioners must also submit all data and material in their possession which supports or illustrates each of the deficiencies complained of. Data and material from generally available publications may be cited rather than furnished. Petitioners must also state what relief they seek with respect to each of their complaints. A broad statement requesting denial or rescission of the license or its amendment without stating why such extreme relief is appropriate will not satisfy the requirement to state the relief sought.

Id (emphasis in original).

II. Legal Standards for Intervention

The Commission's and Presiding Officer's Orders require that a petitioner "set forth with particularity" its interest and how that interest may be affected. Those orders also provide that the standing of petitioners to intervene will be governed by existing NRC precedent under 10 C.F.R. § 2.714(d).

Under NRC precedent, contemporary concepts of judicial standing are to be used in allowing or disallowing intervention. Portland General Electric Co. (Pebble Springs Nuclear

Plant, Units 1 & 2), CLI-76-27, 4 N.R.C. 610, 613-14 (1976). The standing test is bifurcated. A petitioner must allege (1) "injury in fact" -- some injury that has resulted or will probably result -- and (2) an interest "arguably within the zone of interest protected by the statute." Id. at 613, citing Sierra Club v. Morton, 405 U.S. 727 (1972); Warth v. Seldin, 422 U.S. 490 (1975). Nevertheless, it is generally assumed that an individual has the requisite interest if he resides in close proximity to the plant. Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-522, 9 N.R.C. 54, 56 (1979).

In cases involving applications for a permit to construct or a license to operate a commercial nuclear reactor, residence within 50 miles of the site is generally sufficient to establish standing. Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 N.R.C. 1418, 1421 n.4 (1977); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), LBP-82-43A, 15 N.R.C. 1423, 1433 (1982). However, while nearby residence will also establish standing to intervene in a materials licensing proceeding,^{1/} closer proximity should be required in those types of cases than in reactor licensing proceedings. In Boston Edison Co. (Pilgrim Nuclear

^{1/} Armed Forces Radiobiology Research Institute (Cobalt-60 Storage Facility), ALAB-682, 16 N.R.C. 150, 154 (1982) (residence within three miles of facility sufficient).

Power Station), LBP-85-24, 22 N.R.C. 97, 99 (1985), aff'd on other grounds, ALAB-816, 22 N.R.C. 461 (1985), the Licensing Board held that residence 43 miles from a plant was insufficient to establish standing in a proceeding addressing spent fuel storage. The application of a stricter rule to a materials licensing proceeding was also advanced by former Commissioner Ahearne:

[T]here is some difficulty using the concept of "geographical proximity." For power reactors, geographical proximity (living within about 50 or 60 miles is sufficient to establish standing because we infer a health and safety interest from that proximity.

. . . Clearly a reactor poses a threat for a broader geographic area than most activities licensed under a materials license. Whereas living 50 or 60 miles may be sufficient to establish standing for a reactor, I could not expect it to be sufficient for most materials licenses.

Rockwell International (Energy Systems Group Special Nuclear Materials License No. SNM-21), CLI-83-15, 17 N.R.C. 1001, 1005 (1983) (additional views of Commissioner Ahearne).

A petitioner that is an organization may have standing as a representative of its members as long as at least some of its members would be entitled to intervene in their own right. To establish representational standing, an organization must identify by name and address at least one of its members who has the requisite interest and who wishes to be represented by the organization. Virginia Electric & Power Co. (North Anna

Nuclear Power Station, Units 1 and 2), ALAB-536, 9 N.R.C. 402, 404 (1979). Furthermore, where an organization's authorization to represent the member is not self-evident (e.g. where it cannot be inferred from the organization's charter), a specific representational authorization by that individual must be provided. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 N.R.C. 377, 396-97 (1979).

In a formal NRC proceeding, a petitioner must also plead at least one admissible contention in order to be granted party status. 10 C.F.R. § 2.714. The requirement in this informal proceeding that a petitioner must identify and support issues with particularity dictates the imposition of an analogous requirement here. Where a petitioner has failed to identify with specificity a cognizable issue and to support that issue with citation, discussion, data, and documents or references, the petitioner should be denied party status.

III. The Petition of the City of Ashtabula Should Be Denied

The City of Ashtabula does not have standing to participate in this proceeding. It has no special status to intervene under 10 C.F.R. § 2.714(c). Hence, it is in no different position from any other organization. To establish standing under 10 C.F.R. § 2.714(d), the city must either demonstrate injury in fact to itself or to persons it represents.

The City of Ashtabula has not demonstrated that it has any cognizable personal interest as an organization or that the city itself might suffer some injury. Any basis for its intervention must therefore be representational. Ashtabula, however, is approximately 120 miles east of the Davis-Besse site. This distance is much too far to confer standing on any of Ashtabula's citizens. Thus Ashtabula does not have representational standing.^{2/}

Ashtabula's lack of standing would be no different if 10 C.F.R. § 2.715(c) applied. 10 C.F.R. § 2.715(c) permits an "interested" municipality to participate in a formal reactor licensing proceeding. If none of its citizens has a cognizable interest that might be affected, a municipality cannot be considered "interested." Licensee knows of no instance in a reactor operating license proceeding where a municipality located more than 50 miles from a site was permitted to participate under 10 C.F.R. § 2.715(c).

^{2/} When a petitioner fails to demonstrate standing as of right, a presiding officer may still allow intervention as a matter of discretion. Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 N.R.C. 610, 614-17 (1976). However, such intervention depends on a balancing of factors, the most important of which is a petitioner's potential contribution to the record. Id. at 616-17. A petitioner, as the proponent of an order permitting discretionary intervention, has the burden of persuasion. In the case at hand, the City of Ashtabula has made no such affirmative showing.

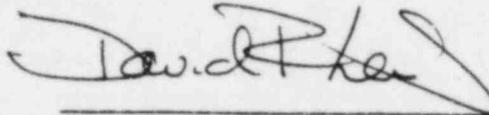
Ashtabula's petition should also be denied for its failure to comply with the Presiding Officer's pleading instructions. The petition contains no citation to any of Licensee's reports describing and evaluating the burial of very low level radioactive waste. It contains no detailed discussion of any deficiency.^{3/} No data, materials, or references are provided to support Ashtabula's conclusory assertions. Furthermore, no relief is specified. The petition does not meet the requirements set forth in the March 10 Memorandum and Order.

^{3/} Licensee also wishes to point out that Ashtabula's third contention, alleging that Licensee is implicitly seeking "release of the Davis-Besse site for unrestricted use for radioactive garbage disposal when the plant is decommissioned," is without merit. Ashtabula is misconstruing a statement in the NRC Staff's environmental assessment, which pointed out that the level of radioactivity in the resin to be buried at Davis-Besse is so low that burial of the resin would not prevent unrestricted use of the site after decommissioning. See 50 Fed. Reg. 41,267 (1985). All this statement means is that there will be no significant radiation levels. Licensee has not proposed operating a radioactive waste disposal site, and in any event could not do so without first obtaining a license under 10 C.F.R. Part 61. Nor has it sought approval to decommission the site.

IV Conclusion

For the reasons stated above, the petition of the City of Ashtabula should be denied. Licensee does not object to the petition being treated as a limited appearance statement.

Respectfully submitted,



Jay E. Silberq, P.C.
David R. Lewis
SHAW, PITTMAN, POTTS & TROWBRIDGE

Counsel for
The Toledo Edison Company et al.

Dated: April 23, 1986

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Administrative Judge

In the Matter of)
TOLEDO EDISON COMPANY, ET AL.) Docket No. 50-346-ML
(Davis-Besse Nuclear Power)
Station, Unit No. 1))

SERVICE LIST

Helen F. Hoyt, Esquire
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Docketing & Service Section
Office of the Secretary
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Charles A. Barth, Esquire
Office of the Executive Legal
Director
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Thomas J. Hassett, President
City Council - City of Ashtabula
4400 Main Avenue
Ashtabula, Ohio 44004