

February 27, 1986 ^{DOCKETED} _{SNRC}

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF REGULATORY
DOCKETING & SERVICE
BRANCH

In the Matter of)	
)	
PACIFIC GAS AND ELECTRIC)	Docket Nos. 50-275 OLA
COMPANY)	50-323 OLA
(Diablo Canyon Nuclear Power Plant)	
Units 1 and 2))	

RESPONSE OF THE NRC STAFF TO THE PETITION
FOR LEAVE TO INTERVENE FILED BY
SAN LUIS OBISPO MOTHERS FOR PEACE

I. INTRODUCTION

On January 13, 1986, the Nuclear Regulatory Commission published in the Federal Register (51 Fed. Reg. 1451) a notice entitled "Consideration of Issuance of Amendments to Facility Operating Licenses DPR-80 and DPR-82 for Diablo Canyon Nuclear Power Plant, Units 1 and 2, Respectively, and Proposed No Significant Hazards Consideration Determination and Opportunity for Hearing" concerning the request by Pacific Gas and Electric Company (Licensee) for amendments to Facility Operating License Nos. DPR-80 and DPR-82 which would authorize the Licensee to increase the Diablo Canyon Nuclear Power Plant, Unit 1 and Unit 2, spent fuel storage capacity from 270 to 1324 storage locations for each unit. On February 7, 1986, Sandra A. Silver filed a letter (hereinafter "Petition") requesting a hearing and petitioning for leave to intervene on behalf of the San Luis Obispo Mothers for Peace ("Mothers for Peace"). The Staff's response to this petition is set forth below.

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II. DISCUSSION

A. The Standards for Intervention

I. Petitioners Must Meet the "Interest" Requirements of 10 C.F.R. § 2.714

Section 189a of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2239(a), provides that:

In any proceeding under [the] Act, for the granting, suspending, revoking, or amending of any license . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

Section 2.714(a)(2) of the Commission's Rules of Practice, 10 C.F.R. § 2.714(a)(2), requires that a petition to intervene in a Commission proceeding set forth with particularity:

- (1) the interest of the petitioner in the proceeding;
- (2) how that interest may be affected by the results of the proceeding; and
- (3) the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene.

In order for intervention to be granted, the Atomic Safety and Licensing Board designated to rule on petitions to intervene and/or requests for hearing must find that the petition satisfies these standards. ^{1/}

In determining whether the requisite interest prescribed by both Section 189a of the Atomic Energy Act and Section 2.714 of the Commis-

^{1/} Intervention may also be granted as a matter of discretion to a petitioner who is not entitled to intervention as a matter of right if the petitioner can show that the Commission's specific criteria weigh in favor of discretionary intervention. See Portland General Electric Company, et al. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 616 (1976). Since, the instant petitioner has not addressed these criteria, which is its burden (Nuclear Engineering Company (Sheffield, Illinois, Low-Level Radiation Waste Disposal Site), ALAB-473, 7 NRC 737, 745 (1978)), discretionary intervention will not be discussed further.

sion's Rules of Practice is present, the Commission has held that contemporaneous judicial concepts of standing are controlling. Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976). Thus, there must be a showing (1) that the action being challenged could cause "injury-in-fact" to the person seeking to intervene ^{2/} and (2) that such injury is arguably within the "zone of interests" protected by the Atomic Energy Act ^{3/} of the National Environmental Policy Act. ^{4/} Id. See also Warth v. Seldin, 422 U.S. 490 (1975); Sierra Club v. Morton, 405 U.S. 727 (1972); Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 153 (1970).

The Appeal Board has ruled that the close proximity of a petitioner's residence, standing alone, is sufficient to satisfy the interest requirements. Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979). Though no firm outer boundary for this zone of interest has been determined, distances of up to 50 miles have been accepted by the Appeal Board as con-

^{2/} "Abstract concerns" or a "mere academic interest" in the matter which are not accompanied by some real impact on a petitioner will not confer standing. See In the Matter of Ten Applications for Low-Enriched Uranium Exports to EURATOM Member Nations, CLI-77-24, 6 NRC 525, 531 (1977); Pebble Springs, CLI-76-27, supra, 4 NRC at 613. Rather the asserted harm must have some particular effect on a petitioner, Ten Applications, CLI-77-24, supra, and a petitioner must have some direct stake in the outcome of the proceeding. See Allied-General Nuclear Services, et al. (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420, 422 (1976).

^{3/} 42 U.S.C. § 2011 et seq.

^{4/} 42 U.S.C. § 4321 et seq.

ferring standing upon particular petitioners. See, e.g., Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1419, 1421 at n.4 (1977); Cf. Virginia Electric and Power Company (North Anna Power Station, Units 1 and 2), ALAB-146, 6 AEC 631, 633-34 (1973); Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 190, 193, reconsideration denied, ALAB-110, 6 AEC 247, aff'd, CLI-73-12, 6 AEC 541 (1973).

An organization may gain standing to intervene based on injury to itself. Edlow International Company, CLI-76-6, 3 NRC 563, 572-74 (1976). If the organization seeks standing on its own behalf, it must establish that it will be injured and that the injury is not a generalized grievance shared in substantially equal measure by all or a large class of citizens. Ten Applications, CLI-77-24, supra, at 531. On the other hand, an organization may establish standing through members of the organization who have an interest which may be affected by the outcome of the proceeding. Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-322, 3 NRC 328, 330 (1976). When an organization claims that its standing is based on the interests of its members, the organization must identify one or more individual members (by name and address) whose interests may be affected and give some concrete indication that such members have authorized the organization to represent their interests in the proceeding. Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 393-97 (1979); Public Service Electric and Gas Company (Salem Nuclear Generating Station, Units 1 and 2), ALAB-136, 6 AEC 487, 488-89 (1973); Duquesne Light Company,

et al. (Beaver Valley Power Station, Unit No. 1), ALAB-109, 6 AEC 243, 244 at n.2 (1973). Specific representational authorization of a member with personal standing is not required where the sole or primary purpose of the petitioning organization is to oppose nuclear power in general or the particular facility at bar. Allens Creek, ALAB-535, supra, at 396. ^{5/}

2. Petitioners Must Meet the "Aspect" Requirements of 10 C.F.R. § 2.714

In addition to demonstrating "interest", a petitioner must set forth "the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene." 10 C.F.R. § 2.714(a)(2). ^{6/} While there is little guidance in NRC case law as to the meaning of "as-

^{5/} Further, under Section 2.713 of the Commission's Rules of Practice, a "partnership, corporation or unincorporated association may be represented by a duly authorized member or officer, or by an attorney-at-law." 10 C.F.R. § 2.713(b) (emphasis added). Thus, where an organization is represented by one of its members, the member must demonstrate authorization by that organization to represent it. It is clear that groups may not represent persons other than their own members, and individuals may not assert the interest of other persons. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-77-11, 5 NRC 481, 483 (1977); Watts Bar, ALAB-413, supra at 1421; Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit No. 2), ALAB-470, 7 NRC 473, 474 n.1 (1978). There is, under the Atomic Energy Act and the Commission's regulations, no provision for private attorneys general. Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 and 2), ALAB-333, 3 NRC 804, 806 n.6 (1976); Long Island Lighting Company, LRP-77-11, supra, at 483.

^{6/} 10 C.F.R. § 2.714 also requires the petitioner to file ". . . a supplement to his petition to intervene which must include a list of the contentions which petitioner seeks to have litigated in the matter, and the bases for each contention set forth with reasonable specificity." This section further provides: "A petitioner who fails to file such a supplement which satisfies the requirements of this paragraph with respect to at least one contention will not be permitted to participate as a party." The NRC staff will respond to the contentions set forth in the supplements after their receipt. Accordingly, noth-

pect" as the term is used in 10 C.F.R. § 2.714, it appears that a petitioner may satisfy this requirement by identifying general potential effects of the licensing action or areas of concern which are within the scope of matters that may be considered in the proceeding.^{7/} See North Anne, ALAB-140, supra, at 633; Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), Licensing Board "Memorandum and Order Ruling on Petitions and Setting Special Prehearing Conference", dated September 21, 1979, slip. op. at 6 (unpublished Order).

B. Evaluation of the Mothers For Peace Petition

1. The Mothers for Peace Interest and Standing

The Petitioner sets forth its interest based on the general assertion that its members ". . . are residents, property owners and tax payers living in San Luis Obispo County". Petition at 1. The injury asserted by the Petitioner is that ". . . the reracking of the spent fuel pools pose a threat to the health and safety of our families, our neighbors and our community." Id. While it appears that the petitioner will have no difficulty establishing standing in the instant proceeding as it has done in the

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

ing said herein by the Staff regarding a petitioner's "aspects" is intended to apply in any way to a petitioner's satisfaction of the 10 C.F.R. § 2.714 contention requirements.

^{7/} The subject matter of the proceeding, for purposes of identification of "aspects" relates to the question of public health and safety of the proposed action (issuance of the amendments) and not the procedural determination made by the Commission staff concerning whether or not the proposed action involves a "significant hazards consideration." See, 48 Fed. Reg. 14864, 14865 (April 6, 1983).

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^{8/} The fact that the Petitioner has been admitted in another proceeding concerning Diablo Canyon does not excuse its failure to demonstrate that the requirements for intervention are met for this proceeding. Its prior participation in a Diablo Canyon proceeding is not alone sufficient to establish its interest with regard to a separate proceeding for the same facility. See Philadelphia Electric Co. (Peach Bot-

sufficient to satisfy the criteria, identified above, for establishing the interest and standing of organizations. The petition has failed to establish how the organization itself will be injured by the proposed action, Edlow International Company, CLI-76-6, supra, at 572-74; Ten Applications, CLI-77-24, supra, at 531, nor does it, in the alternative, demonstrate standing through its members since it does not identify the address of a single member who resides within close proximity to the Diablo Canyon Nuclear Power Plant (North Anna, ALAB-522, supra) and who has authorized the Mothers for Peace to represent his or her interests in the proceeding. Allens Creek, ALAB-535, supra, at 393-97.

The Petitioner can remedy these deficiencies by amending its petition to demonstrate standing either based on injury to the organization itself or based on the standing of one of its members (i.e. the identification of the address of a single member indicating residence within close proximity to the Diablo Canyon facility, see North Anna, ALAB-522, supra, as well as the requisite authorization by such individual that the organization represent his or her interest, see Allens Creek, ALAB-535, supra). In light of the Petitioner's long and active participation in the Diablo Canyon operating license proceeding the Staff would expect that the foregoing deficiencies can readily be remedied.

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

tom Atomic Power Station, Units 2 and 3), LBP-75-22, 1 NRC 451, 454-55 (1975); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), LBP-73-26, 6 AEC 612, 616 (1973).

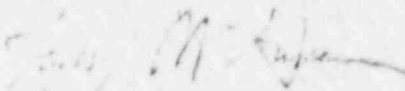
2. Specific Aspects of the Subject Matter of the Proceeding

The Mothers of Peace petition has expressed a concern that falls within the scope of this proceeding, that is whether the seismic design of the spent fuel pool as modified by the proposal is adequate. Accordingly, the Staff finds that the petition filed on behalf of the Mothers for Peace does properly set forth a specific aspect of the proposed amendments on which it wishes to intervene.

III. CONCLUSION

For the reasons stated above, the NRC staff believes that the petition for leave to intervene filed on behalf of Mothers for Peace satisfies the "aspect" requirements of 10 C.F.R. § 2.714 but has failed to satisfy the standing requirements of 10 C.F.R. § 2.714. The Staff urges, in light of this deficiency, that Mothers for Peace be given a reasonable period of time to cure this deficiency.

Respectfully submitted,



Henry J. McGarren
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 17th day of February, 1986

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OFFICE OF GENERAL COUNSEL
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CERTIFICATE OF SERVICE

I hereby certify that copies of "RESPONSE OF THE NRC STAFF TO THE PETITION FOR LEAVE TO INTERVENE FILED BY SAN LUIS OBISPO MOTHERS FOR PEACE" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, this 27th day of February, 1986:

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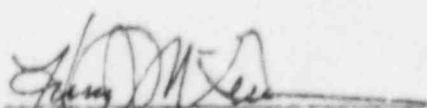
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