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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Administrative Judge

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

LICENSEE'S RESPONSE OPPOSING THE PETITION OF
TOLEDO COALITION FOR SAFE ENERGY AND SUSAN A. CARTER
FOR LEAVE TO INTERVENE

The Toledo Edison Company et al. ("Licensee") hereby responds to the "Petition of Toledo Coalition for Safe Energy and Susan A. Carter for Leave to Intervene on Radioactive Sludge Disposal Issue and for Adjudication Hearing," which the petitioners filed with the Nuclear Regulatory Commission (NRC) on November 5, 1985. Licensee submits that the petition should be denied, but does not object to it being treated as a limited appearance statement.

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I. Introduction

This proceeding involves the authorization which the Nuclear Regulatory Commission granted to 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 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. The November 5, 1985 petition filed by Toledo Coalition for Safe Energy and Susan Carter was one of these requests. On February 20, 1986, the Commission instituted an informal proceeding upon these requests. Commission Order (February 20, 1986). The Commission instructed the Presiding Officer to invite "all interested persons desiring to intervene . . . to file a petition to intervene" Id. at 3. 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. 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. Finally, the Commission stated that Toledo Coalition For Safe Energy and Susan Carter would be a party to the proceeding "if their petitions are found to be adequate." Id. at 3.

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 Memorandum 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). The Presiding officer directed all persons who wished to become a party, including Toledo Coalition for Safe Energy and Susan A. Carter, to file this information. 51 Fed. Reg. at 8,921.

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 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

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).

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 to represent 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 requirements 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 citations, discussion, data, and documents or references, the petitioner should be denied party status.

III. The Petition of Toledo Coalition for Safe Energy and Susan A. Carter Should Be Denied

Toledo Coalition for Safe Energy (TCSE) and Susan A. Carter filed their petition jointly, but each is required to demonstrate standing. In the March 10 Memorandum and Order, the Presiding officer noted that the petition of TCSE and Susan Carter detailed standing. Licensee, however, respectfully submits that the showing in the petition is inadequate; and to the

extent that the March 10 Memorandum and Order might be construed as finding to the contrary, Licensee requests reconsideration in light of the precedents discussed above. Based on these precedents, Licensee submits that neither TCSE nor Susan Carter has standing to intervene.

TCSE alleges no injury to itself; nor does TCSE identify any specific member residing in proximity to the Davis-Besse site to support representational standing.^{2/} Similarly, TCSE provides no representational authorization from any member. TCSE has therefore clearly failed to demonstrate injury in fact and its standing to intervene.

Susan Carter also fails to demonstrate injury in fact, i.e. "some injury that has occurred or will probably result from the action involved." Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 N.R.C. 610, 613-14 (1976) (emphasis added). See also Philadelphia Electric Co. (Limerick Generating station, Units 1 and 2), LBP-42-83A, 15 N.R.C. 1423, 1444 (1982) (there must be some reasonable possibility that the injury alleged might occur). Ms. Carter has not alleged any injury, let alone one that some reasonable possibility of occurrence.

^{2/} There is no indication that Susan Carter is a member of TCSE.

The only assertion the petition makes to support Ms. Carter's standing is that Ms. Carter resides about 21 miles from the Davis-Besse site. The issue, therefore, is whether this assertion alone is sufficient to demonstrate injury in fact. It is not. While residence about 21 miles from a site would suffice in a reactor operating license proceeding, greater proximity should be required for a materials licensing proceeding involving de minimis levels of radioactivity. See discussion on pages 5-6, supra. Licensee submits that in such a proceeding a petitioner must allege injury in fact or prove residence in the immediate vicinity of the site. See e.g., Armed Forces Radiobiology Research Institute (Cobalt-60 Storage Facility), ALAB-682, 16 N.R.C. 150, 154 (1982) (residence within three miles of the facility sufficient); Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 N.R.C. 54, 57 (1979) (residence within "little more than a stone's throw from the facility" sufficient in a storage pool modification proceeding).^{3/}

^{3/} 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. Furthermore, a petitioner, as the proponent of an order permitting discretionary intervention, has the burden of persuasion. In the case at hand, TCSE and Susan Carter made no such affirmative showing.

Aside from their lack of standings, TCSE and Susan Carter should not be admitted as parties in this proceeding because they have failed to identify with sufficient particularity and support those issues they seek to raise. The Presiding Officer's March 10, 1986 Memorandum and Order instructed petitioners to describe deficiencies specifically, provide particular citations relating to the deficiencies, provide a detailed explanation, submit supporting data and materials, and state the specific relief requested with respect to each claim. The Memorandum and Order specifically instructed TCSE and Susan Carter to file this information. To permit petitioners to comply, Licensee placed applicable documents in a public document room in Toledo, and provided notice to TCSE and Susan Carter. See Letter from J. Silberq to Presiding Officer (March 7, 1986), a copy of which was served on the petitioners.

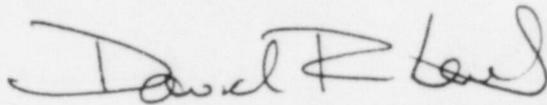
Yet despite the Presiding Officer's clear and unequivocal instruction, TCSE and Susan Carter have elected to rest on their original petition. In contrast to the Presiding Officer's instructions, the issues in TCSE and Susan Carter's petition are vague and conclusory. There is not a single reference to Licensee's reports describing and evaluating the disposal of very low level radioactive waste at the Davis-Besse site. There is no data, references or material provided in support of

the issues; and there is no claim for relief. TCSE's and Susan Carter's failure to conform their pleading to the Presiding Officer's instructions is grounds in itself for denying their petition.

IV. Conclusion

For the reasons stated above, the "Petition of Toledo Coalition for Safe Energy and Susan A. Carter for Leave to Intervene on Radioactive Sludge Disposal Issue and for Adjudication Hearing," dated November 5, 1985, should be denied. Licensee does not object to the petition being treated as a limited appearance statement.

Respectfully submitted,



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The Toledo Edison Company et al.

Dated: April 28, 1986

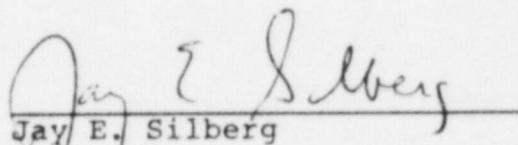
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing
LICENSEE'S RESPONSE OPPOSING THE PETITION OF TOLEDO COALITION
FOR SAFE ENERGY AND SUSAN A. CARTER FOR LEAVE TO INTERVENE was
mailed, first class mail, postage prepaid, to the attached ser-
vice list, this 28th day of April, 1986.


Jay E. Silberg

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