



OFFICE OF THE
GENERAL COUNSEL

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

September 19, 1997

G. Paul Bollwerk, III, Chairman
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dennis D. Murphy
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Jerry Kline
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

In the Matter of
Private Fuel Storage, L.L.C.
(Independent Spent Fuel Storage Installation)
Docket No. 72-22-ISFSI

Dear Administrative Judges:

In the "NRC Staff's Response to Request for Hearing and Petition to Intervene Filed by the Confederated Tribes of the Goshute Reservation and David Pete," dated September 18, 1997, the Staff addressed, *inter alia*, the Confederated Tribes' eligibility to participate in this proceeding as an interested governmental entity, pursuant to 10 C.F.R. § 2.715(c). *Id.* at 14-17.

In connection with that discussion, I am enclosing a copy of the decisions in *Exxon Nuclear Co.* (Nuclear Fuel Recovery and Recycling Center), ALAB-447, 6 NRC 873 (1977), and LBP-77-59, 6 NRC 518 (1977), in which a California governmental unit was permitted to participate as an "interested State" in a proceeding concerning a spent fuel reprocessing facility in Tennessee. Inasmuch as these decisions discuss the meaning of the term "interested State," the Staff believes that they may be relevant to your consideration of this issue.

Sincerely,

Sherwin E. Turk
Counsel for NRC Staff

Enclosure: As stated

cc w/encl.: Service List

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Jerome E. Sharfman, Chairman
Richard S. Salzman
Dr. W. Reed Johnson

In the Matter of

Docket No. 50-564

EXXON NUCLEAR COMPANY, INC.

(Nuclear Fuel Recovery and
Recycling Center)

December 13, 1977

Upon appeal from a Licensing Board order (LBP-77-59, 6 NRC 518) granting intervention, the Appeal Board agrees that a distant state may be admitted as an "interested State" pursuant to 10 CFR §2.715(c).

Licensing Board order affirmed.

RULES OF PRACTICE: INTERVENTION BY A STATE

A state seeking intervention pursuant to the "interested State" provision of 10 CFR §2.715(c) need not be the state in which the reactor is located.

ATOMIC ENERGY ACT: PARTICIPATION BY A STATE

Section 274.1 of the Atomic Energy Act, 42 U.S.C. §2021(1), which directs the Commission to permit the State where nuclear activities are to be located to participate in a licensing proceeding without necessarily becoming a party, does not preclude the Commission from permitting other states similarly to participate.

Messrs. Edward L. Cohen, Leonard M. Trosten and
M. Reamy Ancarrow, Washington, D.C., for Exxon
Nuclear Company, Inc.

Ms. Kathryn Burkett Dickson, Sacramento, California, and Messrs. Herbert H. Brown and Lawrence Coe Lanpher, Washington, D.C., for the California Energy Resources Conservation and Development Commission.

Messrs. Myron Karman and Bruce A. Berson for the Nuclear Regulatory Commission staff.

DECISION

Opinion of Mr. Sharfman:

This is a proceeding on the application of Exxon Nuclear Company ("Exxon") for a permit to construct a facility for the storage and reprocessing of spent fuel from light-water nuclear power reactors. In ALAB-425,¹ we decided, on a certified question from the Licensing Board, that the proceeding should not be suspended pending decision by the Commission of what direction to take in its rulemaking proceeding on the use of mixed oxide fuel. The Licensing Board thereupon issued an order disposing of various petitions to intervene and to participate in the proceeding.² Exxon appeals from that portion of the order permitting the participation of the California Energy Resources Conservation and Development Commission ("the Energy Commission") as an "interested State" pursuant to 10 CFR §2.715(c). The staff supports the decision below, as does the Energy Commission itself.³

Section 2.715(c) of this Commission's Rules of Practice states:

The presiding officer will afford a representative of an interested State which is not a party a reasonable opportunity to participate and to introduce evidence, interrogate witnesses, and advise the Commission without requiring the representative to take a position with respect to the issues.

The question before us is the meaning of the term "interested State" in that rule.

¹6 NRC 199 (August 3, 1977).

²LBP-77-59, 6 NRC 518 (September 30, 1977).

³The Energy Commission filed its brief on appeal late, representing that the lateness was caused by the recent resignation of its general counsel and the resulting reorganization of its general counsel's office. No other party having objected, we accept its late filed brief.

In its Notice of Participation,⁴ the Energy Commission stated that it has exclusive authority for the "certification of proposed thermal power plants, transmission lines, and related facilities in California." It further asserted⁵ that §25524.1 of the California Public Resources Code

prohibits Commission certification of any new nuclear power plant requiring the reprocessing of fuel rods until (1) "the commission finds that the United States through its authorized agency had identified and approved, and there exists a technology for the construction and operation of nuclear fuel rod reprocessing plants," and (2) the Energy Commission's findings are reviewed by the California Legislature. Furthermore, the Commission is required "to find on a case-by-case basis that facilities with adequate capacity to reprocess nuclear fuel rods from a certified nuclear facility or to store such fuel if such storage is approved by an authorized agency of the United States are in actual operation or will be in operation at the time such nuclear facility requires such reprocessing or storage" Cal. Pub. Res. Code §25524.1(b).

The Energy Commission therefore argues that it "has a vital interest in the issues involved in and the ultimate decision on this application to construct a nuclear fuel rod reprocessing plant."⁶

Exxon's main argument is that §274.1 of the Atomic Energy Act (42 U.S.C. §2021(l)) prohibits the Commission from permitting any state other than the one in which the reactor in question is to be located to participate in a licensing proceeding as an interested State. Neither §274.1 itself nor anything in its legislative history supports that thesis. Indeed, if it were valid, then the Commission's longstanding practice of permitting states whose borders are close to the site of a proposed nuclear facility to participate in its licensing proceeding under §2.715(c)⁷ would be unlawful—an

⁴At p. 1.

⁵*Id.*, p. 2.

⁶*Ibid.*

⁷Section 274.1 provides:

With respect to each application for Commission license authorizing an activity as to which the Commission's authority is continued pursuant to subsection c., the Commission shall give prompt notice to the State or States in which the activity will be conducted of the filing of the license application; and shall afford reasonable opportunity for State representatives to offer evidence, interrogate witnesses, and advise the Commission as to the application without requiring such representatives to take a position for or against the granting of the application.

⁸See, e.g., *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-74-32, 8 AEC 217, 217-18 (1974) (participation of Maryland; reactors in Pennsylvania); *Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear-1), ALAB-241, 8

Continued on next page

absurd result. Section 274.1 and the legislative history alluded to by Exxon establish only that the state of location has a right to participate; they do not prohibit the Commission from granting other states permission to do likewise.

In fact, I think it clear that the Commission had done more than §274.1 required it to do in affording states the opportunity to participate in its licensing proceedings without having to establish a right to intervene as a party. Section 2.715(c) extends this opportunity to "an interested State," not merely to a state in which the reactor will be located. Had the Commission meant to limit participation to the latter category of state, it could easily have used appropriate language to express that purpose. That it did not do so manifests an intent to afford recognition to a broader range of interests.

My construction of §2.715(c) is reinforced by the recent decision of the Commission in *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-77-25, 6 NRC 535 (October 14, 1977). In that case, Massachusetts had been allowed to participate as an interested State even though the reactors were to be built in New Hampshire.⁹ However, it had not petitioned for review of the Appeal Board's decision. After the Commission granted such review, Massachusetts asked to be made a party to the review proceeding, stating that it had previously remained silent because it supported a petition for review of another party. The Commission construed its rule governing review of our decisions (10 CFR §2.786) to require all those supporting review to petition the Commission for it. Nevertheless, the Commission agreed to let Massachusetts participate in the review proceeding. One of the factors which persuaded it to do so was that "the participation of an interested sovereign state in our licensing process, as a full party or otherwise, is always desirable"¹⁰

Exxon argues that, even if geography is not a limiting factor, it was error to permit the Energy Commission to participate as an interested state because its interest is only informational. While the Energy Commission

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AEC 841, 843 (1974) (participation of Illinois; reactor in Indiana); *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), Licensing Board Order of March 12, 1976, at p. 16 (unpublished) (participation of Kentucky; reactors in Indiana); *Public Service Electric & Gas Co.* (Hope Creek Generating Station, Units 1 and 2), Licensing Board Order of April 3, 1974, at p. 6 (unpublished) (participation of Delaware; reactors in New Jersey); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), Licensing Board Order of March 15, 1974, at pp. 1-2 (unpublished) (participation of Massachusetts; reactors in New Hampshire).

⁹Licensing Board's unpublished order of March 15, 1974, at pp. 1-2.

¹⁰6 NRC 535 at 537.

does hope to obtain information from this proceeding,¹¹ its interest goes much deeper than that. Under its statute, the Energy Commission may not license a nuclear power plant unless it finds that there will be facilities available offsite for either the reprocessing or storage of the spent fuel which will be produced by that plant.¹² At present, there does not exist in the United States an operating commercial reprocessing plant or a facility for the storage of spent nuclear fuel which is available to new customers. For this reason, California has a significant interest in the decision as to whether the construction of a facility of the type proposed by Exxon in this proceeding should be authorized.¹³

Exxon also argues that "other mechanisms are available to the Energy Commission for obtaining information which might be necessary to carry out its state statutory mandate."¹⁴ As I have concluded that the Energy Commission has a right to participate in this proceeding on a ground other than its need for information, this argument is irrelevant. Similarly irrelevant is Exxon's fear that a construction of §2.715(c) which would grant the Energy Commission the right to participate would foster confusion and delay in all nuclear licensing proceedings. I fail to see why such a decision, which simply applies a Commission rule, should create confusion. And §2.715(c) does not condition an interested State's right to participate on a

¹¹See its brief at p. 5.

¹²Section 25524.1 of the California statute also prohibits the Energy Commission from licensing a nuclear power plant "requiring the reprocessing of fuel rods" unless it finds that the Federal government "has identified and approved, and there exists a technology for the construction and operation of nuclear fuel rod reprocessing plants." I am not certain as to whether this provision will have any practical consequence because, presently, virgin uranium fuel is available and it might therefore be difficult to say that any plant *requires* reprocessing of its spent fuel.

¹³On September 28, 1977, two days before issuance of the decision below, California added a new Section 25524.25 to its Public Resources Code. Chapter 1144, Laws 1977, Assembly Bill No. 1852. This section requires the Energy Commission to transmit to the legislature by January 16, 1978, "its determination as to whether all of the findings required by Sections 25524.1 and 25524.2 can be made at that time." If the findings cannot then be made, the Commission is required to recommend to the legislature whether any facilities for which a notice of intention has been filed with the Commission before January 1, 1977, should be exempted from the requirements of Sections 25524.1 and 25524.2. In making the latter determination, the Commission is directed to consider the latest "energy and demand forecast" and the extent to which the need can be met by "nongenerational alternatives," "reasonable conservation measures" or any "practical alternative technology." While this new provision may conceivably result in some proposed nuclear plants being exempted from the basic provisions of the statute, those provisions are still on the books and apply to all proposed plants not granted, or not qualifying for, an exemption. Therefore, the recent amendment does not change my conclusion that the Energy Commission's interest in this proceeding is sufficient to give it the right to participate under §2.715(c).

¹⁴Brief, p. 10.

finding that such participation will not contribute to delay.¹ Once it is determined that a state is an interested State within the rule's meaning, its right to take part in the proceeding is established. That right is not dependent on discretionary factors.

For these reasons, I am of the view that the Licensing Board's decision to admit the Energy Commission was correct.

Opinion of Mr. Salzman:

The Commission's rules permit "a representative of an interested State" that is not a party to participate in licensing proceedings. 10 CFR §2.715(c). The Licensing Board invoked that rule in letting the California Energy Resources Commission appear in this case. Exxon protests, relying on subsection 1 of Section 274 of the Atomic Energy Act of 1954, 42 U.S.C. §2021(1). That subsection directs the Commission to allow agencies of the state where the nuclear activities will be conducted to participate in a "non-party" status. Exxon, however, would read into the subsection an additional purpose, a Congressional intent—unspoken—to deny that privilege to any other state. And the company would read a similar implicit restriction into our Rule 2.715(c).

I do not agree. Congress appended subsection 1 in 1959 to an Atomic Energy Act provision entitled "Cooperation With States."¹ Had it intended the new subsection to shackle in the manner Exxon suggests the Commission's ability to cooperate with the states, that was an odd way to go about it. The two sentences from the Senate committee report on the bill adding subsection 1 which the company calls to our attention do not support its thesis; they merely paraphrase the new subsection.² It is an elementary canon of construction that we "cannot interpret federal statutes to negate their own stated purposes."³ Subsection 1 was added to facilitate state participation in Commission proceedings, not to curtail it.

Second, for fifteen years "interested States" other than the one in which a nuclear facility is proposed have regularly been allowed to participate in our proceedings. To be sure, that practice has never been challenged directly. But it is hornbook law that an agency's reasonable, consistent and contemporaneous interpretations of its governing statute and regulations are entitled to great deference. *Northern Indiana Public Service Co. v. Porter*

¹I do not mean to imply that delaying tactics by an interested State should be tolerated. See 10 CFR §2.718.

²Subsection 1 was added by P.L. 86-373, §1, 73 Stat. 688 (1959).

³S. Rep. No. 870, 86th Cong., 1st Sess. (1959).

⁴*New York State Department of Social Services v. Dublino*, 413 U.S. 405, 419-20 (1973).

County Chapter, 423 U.S. 12, 14-15 (1975). The years of satisfactory practice under the rule as presently interpreted sufficiently dispel the *in terrorem* arguments that the applicant raises against it.

Third, the California commission has far more than what Exxon characterizes as a "general" interest in the outcome of these proceedings. Under California law, before nuclear power plants may be licensed for future operation there, that agency must determine (among other things) the adequacy of facilities for reprocessing or storing used nuclear fuel rods. *Cal. Pub. Res. Code* §25524.1(b). The proceeding at hand involves an application to build just such a fuel reprocessing and storage facility. Although the facility would be in Tennessee, I do not think it can fairly be said that the California commission has no direct and important interest in it, given pending proposals to build additional nuclear power plants in that state. To reach that conclusion does not compel us—as my colleague Dr. Johnson appears to believe—to allow every state to participate in every proceeding to license a nuclear power plant. "Interest" in the context of individual power plants may indeed be more limited; but this case involves a recycling and storage facility.

Moreover, the California commission's interest is not limited to the outcome of the proceeding as my dissenting colleague suggests. What is at stake is the agency's right to participate in the development of the record, to insure that the matters of particular concern to California are fully explored, to ask hard questions about them and to probe the answers given. It is precisely those privileges which Section 2.715(c) was designed to afford state governments without demanding that they prejudice the situation to take advantage of them.⁴ In short, in our proceedings a state agency is not to be analogized to a private party but enjoys a more advantageous position precisely because it represents an aspect of the public interest.

Finally, even were the question a close one, I would not come down on the side of restricting the right of state governments to participate in our proceedings. In the long run, public confidence in our ability to regulate nuclear power responsibility in an evenhanded, dispassionate manner is ill-served by closed hearings and a crabbed reading of regulations.

ORDER OF THE BOARD

In view of the agreement of Messrs. Sharfman and Salzman on the disposition of the appeal, that portion of the Licensing Board's order of September 30, 1977, which permits the Energy Commission to participate in

⁴In pertinent part Rule 2.715(c) provides that a party allowed to participate under its terms may "introduce evidence, interrogate witnesses, and advise the Commission without [being required] to take a position with respect to the issues."

this proceeding as an "interested State" pursuant to 10 CFR §2.715(c) is *affirmed*.

It is so ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING APPEAL BOARD

Margaret E. Du Flo
Secretary to the Appeal Board

Dr. Johnson, dissenting:

My colleagues uphold the Licensing Board's decision to permit the participation of the California Energy Resources Conservation and Development Commission (the Energy Commission) as an interested state pursuant to 10 CFR §2.715(c). I cannot agree with their conclusion in this matter.

States in which the activity being licensed is to take place have been admitted to hearings routinely under Section 2.715(c). In addition, in a number of cases neighboring states have been allowed to participate in the licensing hearings¹ and the rule was used to permit the participation of a faraway state when that state was identified specifically as the proposed storage location for radioactive waste generated by the nuclear power plant for which a license was being sought.² A significant aspect of all cases in which states have been allowed to participate under Section 2.715(c) is that the interest of the state was directly pertinent to the issues being adjudicated in the licensing hearing. These issues are spelled out in the regulations and, in short, include matters related to the safety of the proposed facility, whether the applicant is technically and financially qualified to design and construct the proposed facility, whether the proposed facility would be inimical to the common defense or to the health and safety of the public, and whether the proposed facility would have a significant impact upon the environment (see 10 CFR §2.104). It is the resolution of these issues that the NRC must consider in making a decision to license a facility.

The Energy Commission's interest in the Exxon proceeding, embodied in Section 25524.1 of the California Public Resources Code, is to ascertain

¹See fn. 8, pp. 875-876, *supra*.

²*Vermont Yankee Nuclear Power Corporation* (Vermont Yankee Nuclear Power Station), LBP-73-8, 6 AEC 130 (1973).

the existence of approved fuel reprocessing technology, and that facilities for reprocessing and/or storage of irradiated nuclear fuel may be expected to be in operation when required by nuclear power plants in California (see p. 875, *supra*).³

Thus, the Energy Commission is interested in the final outcome of the proceeding and beyond this it does not identify any interest in the issues to be addressed in the Exxon hearings. The proposed Exxon facility presumably is merely one of a number of fuel reprocessing and/or storage facilities which may be established throughout the country and there is no indication that this facility, planned to be built in Oak Ridge, Tennessee, would be the facility which might serve reactors in the State of California.

Unless the phrase "interested State" in §2.715(c) is to be accorded no more restrictive effect than simply to allow the participation of any state, it is my opinion that the Energy Commission's interest in the Exxon proceeding is not sufficiently pertinent to the matters being adjudicated to allow it to participate under this section of the regulations. Further, the Energy Commission has made no showing that it would contribute to the decisionmaking process. The ability to make such a contribution has been found by the Nuclear Regulatory Commission to be significant, at least in determining whether a private party should be allowed to participate in a licensing hearing at the discretion of a licensing board. *Portland General Electric Company* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (December 23, 1976). Applying this finding as a reasonable guideline in this instance, I could not admit the Energy Commission on a discretionary basis.

In my consideration of this matter, I have taken into account the Energy Commission's role of serving the people and the legislature of the State of California in the search for safe and reliable energy sources. However, since all of the information brought forth at the Exxon hearings will be available to the public, I am not persuaded that participation by the Energy Commission is necessary in order to enable it to carry out its duties under the California Code. Thus, I must conclude that the Energy Commission's participation in the hearing is not justified.

³This is an interest which is, of course, held in common by all who participate in the utilization and regulation of nuclear power. All nuclear power plants are licensed under the assumption that facilities will exist to receive, reprocess and/or store used nuclear fuel. See for example, 10 CFR § 51.20(e).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Sheldon J. Wolfe, Chairman
Dr. Oscar H. Paris
Dr. Hugh C. Paxton

In the Matter of

Docket No. 50-564

EXXON NUCLEAR COMPANY, INC.

(Nuclear Fuel Recovery and
Recycling Center)

September 30, 1977

Upon consideration of various petitions to intervene, the Licensing Board denies the petition of an intervenor whose interests it finds are not arguably within the zone of interest protected by the statute and who has not demonstrated that she can make a substantive contribution to the proceeding; grants the petition of Friends of the Earth on behalf of its thirty-eight members residing within twenty-five miles of the proposed site; and grants the petitions of the State of Tennessee and of the California Energy Resources Conservation and Development Commission pursuant to 10 CFR §2.715(c).

RULES OF PRACTICE: INTERVENTION BY A STATE

Interested states, other than the state or states in which activities under the license will take place, may also intervene under 10 CFR §2.715(c). *Vermont Yankee Nuclear Power Corporation*, LBP-73-8, 6 AEC 130 (1973).

**ORDER RULING ON PETITIONS
FOR LEAVE TO INTERVENE**

On February 10, 1977, the Nuclear Regulatory Commission (NRC) published in the *Federal Register* (42 Fed. Reg. 8439) a Notice of Hearing on Application for Construction Permit. The Notice stated that a hearing would be held before an Atomic Safety and Licensing Board to consider the application by the Exxon Nuclear Company, Inc., for a permit to construct

a reprocessing plant in Roane County, (Oak Ridge) Tennessee, which would have the capacity to store up to approximately 7,000 tons of irradiated nuclear fuel and to process 2,100 tons of fuel per year. Said Notice also stated, among other things, that any person, whose interest might be affected by the proceeding and who wished to participate as a party, must file by March 14, 1977, a petition under oath and affirmation for leave to intervene in accordance with the provisions of 10 CFR §2.714.

As hereinafter discussed, three timely petitions for leave to intervene were filed,¹ and, on April 28, 1977, a special prehearing conference was held in Knoxville, Tennessee, pursuant to 10 CFR §2.751a. The Board heard oral argument upon the aforementioned petitions presented by the NRC Staff, by counsel for Applicant, by counsel for Friends of the Earth, Inc. (FOE), and by Ms. Jeannine Honicker, appearing *pro se*.² Counsel for the State of Tennessee also attended the conference.

Honicker Petition

Ms. Honicker, a resident of Nashville, Tennessee, which is over one hundred miles from the proposed facility, asserts that, if the reprocessing plant is constructed, it is likely that spent fuel rods will be shipped from the south over the rails of the L and N railroad which are very near to her home and rental property, and that, if an accident occurred in that vicinity, it could cause her bodily harm, loss of life or loss of income. She also asserts that, under the Constitution and as a Federal and state taxpayer, she has a right to intervene in the instant proceeding.

In ruling upon petitions to intervene, we are governed by §2.714 of our Rules of Practice which requires that a petition must set forth with par-

¹The Board received a one page so-called letter of intervention dated March 12, 1977, from Ms. Zelia M. Jensen of Grandview, Tennessee. During the course of the special prehearing conference (Tr. 27), we stated that, if Ms. Jensen so desired, she could present a limited appearance statement at the beginning of the hearing pursuant to Section 2.715(a) of our Rules of Practice but that we could not consider the letter as being a petition to intervene because, contrary to Section 2.714, it was not filed under oath and affirmation, it failed to show standing and because it failed to specify contentions and the bases therefor.

The Board also received a Notice of Participation dated May 23, 1977, submitted by the California Energy Resources Conservation and Development Commission which is discussed, *infra*.

²On September 7, 1977, the Commission denied FOE's petition for review of the Appeal Board's decision, ALAB-425, rendered on August 3, 1977, which responded negatively to a question certified by us. In its Order the Commission stated, however, that the time for review of ALAB-425 on its own motion under 10 CFR §2.786(a) was extended to October 19, 1977. Since the Commission's Order did not stay the effectiveness of the Appeal Board's decision, we are proceeding to rule upon the petitions to intervene.

ticularity the petitioner's interest, how that interest may be affected by the results of the proceeding, and the factual basis for the connections with regard to each aspect on which the petitioner desires to intervene. We have reviewed Ms. Honicker's petition and the Staff's and Applicant's answers in opposition thereto and have read the transcript of the special prehearing conference, and conclude that the petitioner has failed to meet these requirements. We so conclude because in *Portland General Electric Company, et. al.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613, decided December 23, 1976, the Commission stated that, to have standing, a petitioner must satisfy two tests—one, some injury must be alleged that has occurred or will probably result from the action involved, and, second, an interest must be alleged that is "arguably within the zone of interest" protected by the statute. Ms. Honicker has failed to satisfy these tests. Her allegations of possible physical and/or economic injury are entirely speculative in nature, being predicated on the tenuous assumptions that the spent fuel will be shipped by the named carrier and that an accident might occur in the area proximate either to her residence or to her rental property. Consequently, we do not deem that Ms. Honicker's interests are arguably within the zone of interest protected by statute. Moreover, in light of *United States v. Richardson*, 418 U.S. 166 (1974), and *Frothingham v. Mellon*, 262 U.S. 447 (1923), we conclude that her allegations of interest under the Constitution or as a taxpayer do not confer standing.

While Ms. Honicker has no standing to intervene as a matter of right, nevertheless we have considered whether in our discretion, pursuant to *Portland General Electric Company, supra*, at pages 614-617, we should allow her intervention. At page 617 of that opinion, the Commission stated:

... As a general matter, however, we would expect practice to develop, not through precedent, but through attention to the concrete facts of particular situations. Permission to intervene should prove more readily available where petitioners show significant ability to contribute on substantial issues of law or fact which will not otherwise be properly raised or presented, set forth these matters with suitable specificity to allow evaluation, and demonstrate their importance and immediacy, justifying the time necessary to consider them.

After assessing all the facts and circumstances in the instant case, we have determined not to permit intervention, because, in the first place, Ms. Honicker has neither showed in her petition nor during the special prehearing conference (Tr. 28-45) that she has a substantial contribution to make on a safety or environmental issue appropriate for consideration at the construction permit stage. We concur with the Licensing Board's assessment in its Order denying Ms. Honicker's petition for leave to intervene in the

Watts Bar proceeding. In *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), LBP-77-36, 5 NRC 1292, 1297 (1977), the Board observed that:

... While the Petitioner is an intelligent person who takes a commendable interest in civic matters, she is not a lawyer nor possessed of scientific or technical training. She does not have available to her some type of professional assistance in connection with the evidentiary presentation. ...

Second, Ms. Honicker has not set forth her contentions with suitable specificity to allow evaluation, nor demonstrated their importance and immediacy. Her petition merely consists of quotations from an ERDA draft environmental statement (paragraphs 1 and 2), of an argument that proceedings should be suspended herein pending ERDA's filing of an environmental impact statement on its proposed sale of land to the Applicant (paragraph 3),³ of questions (paragraph 4), of an excerpt from a resolution adopted by the governing board of the National Council of Churches (paragraph 6), of an excerpt from a newspaper article (paragraph 7), and of an allegation that any cost-benefit analysis is inadequate if it does not address certain problems (paragraph 8).

Accordingly, Ms. Honicker's petition to intervene in this proceeding is denied.⁴ However, pursuant to §2.715(a), Ms. Honicker may make a limited appearance statement at the beginning of the forthcoming hearing.

Petition of State of Tennessee

Under date of March 11, 1977, the State of Tennessee petitioned to intervene as an interested state pursuant to 10 CFR §2.715(c), and both the Applicant and Staff support said state's admission as a participating state.

³This legal argument is without merit. Under these circumstances, we are not legally precluded from proceeding to take evidence on environmental issues which are within our domain pursuant to 10 CFR Part 51. See *Public Service Company of New Hampshire, et. al.* (Seabrook Station, Units 1 and 2), ALAB-293, 2 NRC 660 (1975). See also *Concerned Citizens of Rhode Island, et. al. v. NRC, et. al.*, 430 F. Supp. 627 (1977), wherein the District Court held that it would not block the NRC's docketing and processing of the New England Power Company's application for a construction permit despite the fact that the General Services Administration, which owned the land for the proposed facility, had not complied with a court imposed duty to prepare an Environmental Impact Statement.

⁴During the special prehearing conference, based upon a hearsay statement by an unidentified person, Ms. Honicker questioned whether Roane County has been and is still designated as a county in which there is to be no further releases of radioactivity (Tr. 31). At the forthcoming hearing, the Applicant and Staff should present evidence in response to this question.

We confirm our ruling made during the special prehearing conference (Tr. 20) wherein we permitted Tennessee to participate as an interested state.

Friends of the Earth, Inc., Petition

In its petition submitted on March 14, 1977, FOE asserts that its national membership is comprised of approximately 20,000 individuals, including 28 members living in Knoxville, Tennessee, (approximately 20-25 miles from the proposed site) and 10 members living in Oak Ridge, Tennessee (approximately 8-10 miles from the proposed site). (Acting upon the Board direction (Tr. 53), on May 10, 1977, said petitioner submitted affidavits of two of its members residing within 25 miles of the proposed reprocessing plant who deposed that they had authorized FOE to represent their interests in the instant licensing proceeding.) FOE further asserts, among other things, that the health and safety and the environment of its thirty-eight members may be adversely affected by the radioactive gaseous and liquid effluents associated with the operation of the facility and/or by the accidental or willful release of high level radioactive liquids, solid wastes or plutonium. The NRC Staff supports the admission of FOE as a party-intervenor. Applicant opposes FOE's admission on the ground that the petition fails to specify the contentions or the bases therefor with the particularity required by 10 CFR §2.714.

We conclude that FOE has satisfied the Commission's two tests to establish standing as prescribed in the *Pebble Springs* decision, *supra*. FOE has alleged a direct connection between that which is at issue in the instant proceeding, i.e., whether a construction permit shall be granted, and the possible adverse results therefrom. Further, FOE's interests are within the zone of interests protected by both the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2011 *et. seq.* (1970), and the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et. seq.* (1970).

Further, we find that FOE's petition presents at least one contention (as clarified during the special prehearing conference at transcript 92-95) with suitable specificity and, in explaining the basis for it, has evidenced its importance and immediacy.¹ However, it should be noted that in admitting this contention as an issue in controversy, it is not our function to reach the merits thereof at this stage of the proceeding. *Mississippi Power and Light*

¹FOE's Contention 8, as clarified, reads as follows:

Applicant has failed to establish an adequate seismic design basis for the facility. The seismic design is based on a peak acceleration of 0.25g, which is the mean value correlated with a Safe Shutdown Earthquake having a Modified Mercalli Intensity of VIII. FOE contends that Applicant should have used a more conservative acceleration of 0.4g, which is the mean plus one standard deviation from the mean.

Company (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 426 (1973).

Accordingly, FOE's petition to intervene is granted.⁶

Notice of Participation of the California Energy Resources Conservation and Development Commission

On May 23, 1977, the California Energy Resources Conservation and Development Commission (Energy Commission) submitted a Notice of Participation pursuant to 10 CFR §2.715(c).⁷ The Energy Commission asserts that, as established by the California legislature in 1974, it was exclusively authorized to certify proposed thermal power plants, transmission lines and related facilities in California and must also compile and adopt standards to be met in designing and operating such facilities. It asserts that it is prohibited by California law from certifying a new nuclear power plant in California until the United States has identified and approved, and there exists a technology for the construction and operation of nuclear fuel rod reprocessing plants. Accordingly, it states that it has a vital interest in the instant proceedings because, through its participation, it will secure valuable information relevant to its determinations required by California law.

The Staff urges that the Energy Commission be admitted pursuant to §2.715(c). Applicant opposes admission because 42 U.S.C. §2021(i)(1970) evidences that only the state or states in which an activity will be conducted and thus having a direct or immediate interest will be admitted to participate. However, we construe that section of the Act to require that the NRC give prompt notice to the state or states in which an activity will be conducted of the filing of the license application, and to require that a reasonable opportunity be afforded for state representatives to participate. Further, in passing, we note that there is precedent for permitting a state to participate pursuant to §2.715(c) despite the fact that it was not the site of the proposed activity—see *Vermont Yankee Nuclear Power Corporation*

⁶In its petition FOE states an intention to request financial reimbursement for its participation. However, the NRC lacks statutory authority to provide funding. *Nuclear Regulatory Commission* (Financial Assistance To Participants in Commission Proceedings), CLI-76-23, 4 NRC 494 (November 12, 1976).

⁷We do not reach and decide the Staff's assertion that the March 14, 1977, deadline for filing petitions for leave to intervene under 10 CFR §2.714 is not applicable to the 10 CFR §2.715(c) participation by an interested state. In the instant case, the proceedings are in a preliminary stage and will not be delayed by the participation of the Energy Commission.

(Vermont Yankee Nuclear Power Station), 6 AEC 130 (1973), wherein the State of Kansas was permitted to participate as an interested state.

Accordingly, we permit the California Energy Resources Conservation and Development Commission to participate pursuant to 10 CFR §2.715(c).

FOE upon receipt of the instant Order, will informally consult with the Applicant and with the Staff in an effort to stipulate with regard to admissible contentions and the parties will informally initiate and promptly complete discovery with respect thereto. Within thirty days after the receipt of this Order, the parties will notify the Board whether such a stipulation has been executed and/or whether there has been disagreement as to the admissibility of certain contentions.

In accordance with 10 CFR §2.714a, this Order may be appealed to the Atomic Safety and Licensing Appeal Board within five (5) days after service thereof. The appeal shall be asserted by the filing of a notice of appeal and accompanying supporting brief. Any other party may file a brief in support of or in opposition to the appeal within five (5) days after the service of the appeal. No other appeals from rulings on petitions and/or requests for hearing shall be allowed.

Dr. Paxton concurs but was not available to sign the instant Order.

IT IS SO ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Dr. Oscar H. Paris, Member

Sheldon J. Wolfe, Esq., Chairman

Dated at Bethesda, Maryland
this 30th day of September 1977.