

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)	
)	
ARIZONA PUBLIC SERVICE)	Docket Nos. STN 50-528
COMPANY, et al.)	STN 50-529
Palo Verde Nuclear Generating)	STN 50-530
Station, Units 1, 2 & 3)	

REQUEST FOR ORDER REQUIRING PETITIONER TO CURE
PETITION DEFECTS AS RESPECTS
NRC RULES OF PRACTICE

The Applicants hereby request the Board to enter its Order requiring Petitioner to cure the defects of the Petition to Intervene as respects NRC Rules of Practice upon the basis of the attached Memorandum of Points and Authorities which is incorporated herein by this reference.

Respectfully submitted,

SNELL & WILMER

By



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MEMORANDUM OF POINTS AND AUTHORITIES

FACTS

On November 15, 1974, the Arizona Clean Energy Coalition (ACEC), a Tucson based organization, filed a Petition to Intervene in the above-captioned proceeding. This petition was filed within the time set for such petitions in the "Notice of Hearing on Application for Construction Permits" for the Palo Verde Nuclear Generating Station (PVNGS) issued by the Atomic Energy Commission (now the Nuclear Regulatory Commission (NRC)) on October 22, 1974 (39 Fed. Reg. 37528). Both the regulatory staff of the AEC and the Applicants filed answers to this petition citing its substantial non-compliance with the Rules of Practice of the Atomic Energy Commission and the failure to establish grounds upon which intervention could be granted. Subsequently, regulatory counsel for the Atomic Energy Commission met with the Petitioner to discuss the petition. On January 18, 1975, Petitioner filed a new Petition to Intervene, accompanied by a supporting affidavit. Applicants respectfully submit that the Petition to Intervene is still fatally defective by reason of non-compliance with the NRC Rules of Practice.

I.

THE AFFIDAVIT ACCOMPANYING THE ACEC PETITION IS PROCEDURALLY AND SUBSTANTIVELY DEFECTIVE

Section 2.714 of the Rules of Practice of the NRC requires that any petition to intervene must be accompanied by a

supporting affidavit

identifying the specific aspect or aspects of the subject matter of the proceeding as to which he wishes to intervene and/or on which he bases his request for a hearing, and setting forth with particularity both the facts pertaining to his interest and the basis for his contentions with regard to each aspect on which he desires to intervene. (10 CFR § 2.714)

Compliance with this regulation is mandatory if a petitioner desires to be admitted as an intervenor. See, e.g., BPI v. AEC, 502 F.2d 424 (D.C. Cir. 1974); 10 C.F.R. Pt. II, App. A, Section III.

The affidavit accompanying the petition contains no identification of the "specific aspect or aspects of the subject matter of the proceeding" upon which intervention is sought. The affidavit, however, does attempt to set forth information pertaining to the interests of ACEC and its alleged members. The affiant, Donald Osborn, is, of course, incompetent to swear to the interests of any alleged member other than himself. It is firmly established that each individual who has an interest recognizable as a basis for intervention under the Atomic Energy Act of 1954 must personally submit an affidavit attesting to that interest and the facts pertaining to it. See, e.g., Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, RAI-73-3, 188 (March 29, 1973), aff'd RAI-73-4, 241 (AEC Order April 18, 1973), aff'd sub nom.

BPI v. AEC, 502 F.2d 424 (D.C. Cir. 1974); Louisiana Power & Light Company (Waterford Steam Electric Station, Unit 3), ALAB-125, RAI-73-5, 371, 372 n. 6 (May 25, 1973); Duke Power Company (Catawba Nuclear Station, Units 1 and 2), LBP-73-28, RAI-73-9, 666 (Sept. 6, 1973). In the Catawba decision, an organization similar to ACEC was attempting to intervene in a licensing proceeding. The final ruling allowing that organization to participate as an intervenor was limited to that group's representation of its members "who submitted affidavits properly expressing their interests in the hearing." RAI-73-9 at 680.

The petition is accompanied by only the affidavit of Donald Osborn, a member of that organization. Thus, the Board can only consider whether Donald Osborn's affidavit contains sufficient information establishing his interest as an intervenor. As a preliminary threshold matter, of course, it is also clear that ACEC cannot be the petitioning entity unless it is established (1) that ACEC has the authority from its governing body or membership to participate in this matter, and (2) that Donald Osborn has authorized ACEC to represent him. See, e.g., Duke Power Company (Catawba Nuclear Station, Units 1 and 2), supra; Wisconsin Electric Power Company, et al. (Point Beach Nuclear Plant, Unit 1), LBP-73-26, RAI-73-8, 612 (July 17, 1973).

Donald Osborn's interest as stated in the affidavit is that of a Tucson resident and a customer of Tucson Gas and

Electric Company. His status as a Tucson resident, a residency that is well over a hundred miles from the proposed plant site, clearly is so geographically remote that it does not establish an interest recognized by the Atomic Energy Act. See Duquesne Light Company, et al. (Beaver Valley Power Station, Unit No. 1), ALAB-109, RAI-73-4, 243 (April 2, 1973); cf. Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), supra. His interest as a TG&E customer is stated to be

adversely affected by the economic issues of PVNGS which would trend [sic] to increase electric rates. They [the alleged members of ACEC] are, as well, directly affected by the policies and conditions governing energy consumption.

This certainly is not an interest that is (1) stated "with particularity" or (2) within the zone of interests contemplated by the Atomic Energy Act. Stating that an unidentified "economic issue" would tend to increase electric rates, without indicating what that issue is, how an "issue" can affect rates, and without indicating whether Donald Osborn's rates will be affected, is not a statement made "with particularity" nor a statement of "facts." The allegation that "policies and conditions governing energy consumption" will affect the members of ACEC "directly" does not provide any illumination as to a recognizable interest. For example, what policies are being referred to, whose policies are these, is affiant one of the

alleged "members" who will be affected "directly," and, if so, how will those unnamed "policies" affect him? Such vague, conclusionary and unsubstantiated assertions do not meet the specific pleading requirements of Section 2.714, nor do they establish the basis for the requisite interest to intervene required by Section 189(a) of the Atomic Energy Act.

Thus, since no person with the requisite interest has submitted an affidavit personally attesting to that interest, ACEC, even assuming that it has been authorized by its governing body and its individual members, has no one to represent for the purpose of qualifying as an intervenor. Cf. Duke Power Company (Catawba Nuclear Station, Units 1 and 2), supra.

Although the affidavit does attempt to state interests that might be affected by the plant and lists supposed members of ACEC, there is no indication of the specific interests of any alleged member, or how such member's purported interest will be affected by this proceeding. This information can only be properly provided by the personal affidavit of each alleged member. There is no evidence that the organization itself has been properly authorized to appear in this proceeding and there is no evidence that any of the alleged members of that organization have authorized the organization to participate on their behalf. The only individual to submit an affidavit has not alleged a sufficient interest, has not stated any

facts in support of his allegations, nor is he competent to swear as to the interests of any other alleged member of ACEC. Thus, the affidavit accompanying the Petition to Intervene of ACEC does not comply with Section 2.714 of the Rules of Practice and does not state any facts that would establish an interest on the part of anyone to intervene in this proceeding.

II.

THE PETITION TO INTERVENE IS PROCEDURALLY AND SUBSTANTIVELY DEFECTIVE

The Petition to Intervene has not complied with the requirements of Section 2.714(b), which states:

The petition shall set forth the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, and any other contentions of the petitioner, including the facts and reasons why he should be permitted to intervene, with particular reference to the factors set forth in paragraph (d) of this section. The petition that sets forth contentions relating only to matters outside the jurisdiction of the commission shall be denied.

The petition does not set forth the interests of the Petitioner, it does not indicate how any alleged interests may be affected by the results of the licensing proceeding, there is no indication of why Petitioner should be permitted to intervene and, most importantly, the contentions stated are without the requisite specificity and an adequate factual basis. In order for intervention to be granted, the petition to intervene must demon-

strate the requisite interest and at least one valid contention. See, e.g., Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-182, RAI-74-3, 210 (March 7, 1974).

Page thirty-two of the ACEC petition indicates the Petitioner's contentions. The preceding thirty-one pages of allegations are apparently designed to serve as the "factual" basis for these five contentions. None of the contentions are, however, stated with the specificity required as a basis for intervention. Contentions 2 through 5, for example, are merely reiterations of the ultimate issues to be determined in a licensing proceeding, issues that were set forth in the initial notice of hearing. The purpose of intervention is to allow intervenors to participate on matters that are directly related to the interests that they have established. It is not to allow them carte blanche participation in every aspect of the proceeding, which is what Petitioner apparently contemplates. To do so would be to frustrate the intent of intervention in NRC proceedings. Contention 1 is also not stated with the requisite specificity in that it simply alleges that the application does not comply with a specific regulatory provision; the mere assertion of a negative proposition certainly is not a statement with specificity, particularly, where, as here, there is no attempt to show how the application does not comply.

The petition is replete with factual inaccuracies,

irrelevant material and conclusory allegations, making it extremely difficult to discover whether any additional contentions are advanced, and if so, what factual bases are assigned to them. In three instances in the petition, however, the heading "Contention" is found (pages 4, 24 and 29). None of these contentions meet the requirements for intervention. The contention on page 4 of the petition that the Applicants fail to specifically treat the menace posed to the extensive military, private and commercial air traffic of the transmission lines emanating from the PVNGS is certainly devoid of any specificity. For example, what is the menace alluded to, and what air traffic is there in the vicinity of the PVNGS transmission lines? Furthermore, there is absolutely no factual basis assigned to this contention, a basis which, if it exists at all, can only be developed in an affidavit from a person with the requisite knowledge.

At page 24 of the petition, petitioner asserts

[T]he Applicants have failed to treat adequately (PSAR 2.23.6 [sic]) the danger to the PVNGS posed by the activities of military, private and commercial aircraft over and around the proposed site.

This assertion is then followed by a number of factual averments, none of which are sworn to by affidavit, concerning air traffic in the Phoenix and Gila Bend area. Certainly such a contention is not stated with the requisite specificity unless there is

some indication as to how the Applicants have "failed to treat adequately" this alleged danger to PVNGS. Petitioner would have to show some connection between its factual averments and its contention in order to establish at least a minimum basis for its contention. Because there is no specification of Applicants' alleged inadequate treatment of aircraft danger to the plant and no showing of a factual basis for the contention, this contention likewise cannot serve as the basis for intervention.

Petitioner's third possible contention is found at page 29 of the petition:

The Applicants have failed to adequately [sic] evaluate the potential risk of seismic activity at the PVNGS site, (ER Vol. V, Sec. 92.3.1.2) choosing instead 'to rank regions on the basis of the expected ease of demonstrating [sic] the suitability of the sites to regulatory authorities within the time frame specified for the project.'

This contention, which again does not specify how seismic activity has been inadequately evaluated, is followed by a paragraph of statements concerning recent seismic activity, which is again not sworn to by affidavit nor related to the proposed site. No attempt is made to indicate how this information bears on the Applicants' Environmental Report evaluation of seismic activity. In fact, Applicants evaluate seismic activity at length in the PSAR, Section 2.5, et seq.

It is respectfully submitted that petitioner's con-

tentions are simply "vague generalized assertions," which the Atomic Energy Commission has held "are not appropriate for the adjudicatory process." Philadelphia Electric Company, et al. (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-73-10, RAI-73-3, 173, 174 (AEC Order, March 30, 1973).

Applicants do not, of course, wish to have these proceedings delayed further as a result of Petitioner's inability to conform with the NRC Rules of Procedure. We would strongly urge the Board not to allow petitioner to enlarge on contentions in curing defects of the Petition to Intervene. It is respectfully submitted that this Board order Petitioner to cure the defects of the Petition to Intervene as enumerated herein before any final order allowing intervention. In the event Petitioner is unable to cure the defects by a date certain, the Petition to Intervene, or portions thereof, should be dismissed or stricken.

DATED this 10th day of February, 1975.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that true and correct copies of the foregoing "Request for Order Requiring Petitioner to Cure Petition Defects as Respects NRC Rules of Practice" have been placed in the United States Mails, postage prepaid, this 10th day of February, 1975, to the following:

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