

UNITED STATES OF AMERICA
ATOMIC SAFETY AND LICENSING BOARD

IN THE MATTER OF THE APPLICATION OF)
COMMONWEALTH EDISON COMPANY, INTERSTATE)
POWER COMPANY AND IOWA-ILLINOIS GAS AND)
ELECTRIC COMPANY FOR CONSTRUCTION PERMIT)
AND EARLY SITE REVIEW, HEARING, AND)
PARTIAL INITIAL DECISION ON SITE SUITA-)
BILITY)

Docket Nos. S50-599
S50-600



MEMORANDUM IN SUPPORT OF
MOTION FOR LEAVE TO FILE SECOND AMENDED PETITION

Background

On September 4, 1979, Citizens Against Nuclear Power, Inc., James Runyon and Edward Gogol (hereinafter "Petitioners") filed an "Amended Petition for Leave to Intervene and Request for Hearing" in the above captioned proceedings, including therein fifteen contentions. The first of these, actually a five part contention (1A-1E), related to the applicants' peak load forecast, and proposed finding #8 as to the need for the facility and the demand for power. Contentions 2-15 deal with the following: 2) Economic alternatives, especially coal and shortages of uranium; 3) Financial qualifications of applicants; 4) Invalidity of cost-benefit analysis based upon forth year life of facility; 5) Financial hardships on ratepayers; 6) Capital involved in constructing facility and effect on employment; 7-9) Spent fuel and waste storage and transportation; 10) Decommissioning; 11) Invalidity of cost-benefit analysis based upon unknown decommissioning costs; 12) Problems of safely mining uranium; 13) Health consequences of nuclear accidents; 14) Validity of Price-Anderson Act; 15) Lack of suitable evacuation plan.

On September 19, 1979; the Atomic Safety and Licensing Board held a pre-hearing conference to: "1) permit identification of the key issues in the proceeding; 2) take any steps necessary for further identification of the issues; 3) consider all intervention petitions to allow the presiding officer to make such preliminary or final determinations as to the parties to the proceeding as may be appropriate; and 4) establish a schedule for further

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actions in the proceeding." Order of Atomic Safety and Licensing Board, dated 7/30/79. At that time, Applicants were permitted to withdraw findings #8 and 131. By virtue of the withdrawals, this Board ruled that contentions 1 and 10 had been thereby rendered irrelevant and improper for consideration at the site suitability stage. Contentions 2-9 and 11-15 were ruled inadmissible as being more appropriately considered at the construction permit stage. Contention 8 was ruled inadmissible and outside the jurisdiction of this Board. This board declined to issue a final ruling as to contention 15, pending the completion of the Three Mile Island study presently being conducted.

At the hearing, this Board heard argument and testimony as to whether Petitioners have standing to intervene in these proceedings. Petitioner Gogol and this counsel for CANP, Runyon and Gogol expressed the legal basis for petitioners' standing, the basis for possible discretionary intervention, and the keen interest petitioners have in these proceedings. This Board ruled that CANP possesses the requisite standing and took under advisement the question of standing of Petitioners Gogol and Runyon. This counsel for petitioners also expressed his inexperience in the legal representation of intervenors in proceedings before this Board and the Nuclear Regulatory Commission, noting surprise over the permitted withdrawal of applicants' proposed findings 8 and 131 and further noting that a great deal of petitioners' direction, energy and time had been directed toward those precise issues. This counsel for petitioners therewith requested leave to file a second amended petition, setting forth contentions more appropriate for early site review. The following are reasons respectfully submitted to justify such leave.

Leave to Amend Should be Freely Given

The Atomic Safety and Licensing Appeals Board has previously allowed intervenors with standing to amend the intervention petition to assert an issue so that said intervenor could present affirmative evidence on said issue. "To avoid possible misunderstanding, it should be stressed that we do not hold here that an intervenor may adduce affirmative evidence . . . with regard to an issue placed in contest by another party. On such an issue, in order to do more than engage in cross examination of the witnesses called by other parties, the intervenor must seek and obtain leave of the Licensing Board to amend his intervention petition to assert the issue on his own behalf. Leave to amend should be freely given if the Board is satisfied that (1) the intervenor has shown good cause for his failure to have raised the issue at an earlier point; and (2) allowance of the amendment may assist the board in the proper resolution of the issue without occasioning unwarranted delay." Northern States Power Company (Prarie Island nuclear Generating Plant, Units 1 and 2) ALAB-244, 8 AEC 857, 869 at n. 17 (1974).

Petitioners' "failure to have raised the issue at an earlier point" has been discussed earlier (inexperience of counsel and petitioners; concentration of direction and resources towards proposed findings later withdrawn, thereby mooted those contentions). Under the circumstances herein, it is submitted that these matters constitute good cause, under part one of the Northern States Power Company test. The inexperience of petitioners and counsel are factors which should be considered in determining the instant issue. See Kansas Gas & Electric Company and Kansas City Power and Light Company (Wolf Creek Generating Station, Unit 1) ALAB-279, 1 NRC 559, 576-577 ("We can appreciate the difficulties a party may have where it must express in a petition to intervene technical matters beyond the ordinary grist for the legal mill. And we empathize with petitioners who must of necessity proceed pro se, or with counsel new to the field (if not also to the bar). In those circumstances, the Commission has for good and sufficient reason allowed us and the licensing boards leeway in judging the sufficiency of intervention petitions.") The same good and sufficient reason should apply here in allowing petitioners leave to file a second amended petition.

Part two of the Northern States Power Company test ("Allowance of the amendment may assist the board in the proper resolution of the issue without occasioning unwarranted delay.") is also satisfied here. Petitioners' interests in these proceedings are highly contradistinctive to those of Applicants. Petitioners will expend their resources on issues where applicants' findings and conclusions are considered to be questionable (i.e. withdrawn proposed finding 8) or contrary to their interests. As such, Petitioners may assist the Board in properly resolving said issues by the presentation of fresh viewpoints and the scrutiny of Applicants' representations and conclusions. Certainly no unwarranted delay would be occasioned by allowing the amendment. This motion is being made at the earliest possible time herein, within 45 days after the initial prehearing date. Discovery has not yet even commenced. Further, the NRC Staff does not foresee completion of the Draft Environmental Impact Statement or the Site Suitability Environmental Report until June of 1980, at the earliest. By allowing the amendment, no delay or prejudice to any party would be occasioned, as the parties are still basically in the same positions they were in on September 19, 1979, the date of the prehearing conference.

Additional Time for Filing Contentions is Permissible

10 CFR §2.714(b) provides in part: "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. Additional time for filing the supplement may be granted based upon a balancing of the factors in paragraph (a)(1) of this section."

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The paragraph (a) (1) factors are: "(i) Good cause, if any, for failure to file on time. (ii) The availability of other means whereby the petitioners' interest will be protected. (iii) The extent to which the petitioners' participation may reasonably be expected to assist in developing a sound record. (iv) The extent to which the petitioners' interest will be represented by existing parties. (v) The extent to which the petitioners' participation will broaden the issues or delay the proceeding."

Parts (i) and (v) have been dealt with supra, in connection with the Northern States Power Company test. Part (iii) has been partially discussed, insofar as regards the possibility that petitioners may assist the Board in properly resolving the issues before it. Further, as set forth in the Amended Petition, Petitioners may reasonably be expected to assist in developing a sound record via their knowledge of the subject of nuclear power and the resources available to them to study it, and relevant issues herein further. Part (ii) is satisfied because there exists no other means to protect petitioners' interests. The instant proceedings constitute the only avenue wherein petitioners may have some voice and/or effect upon the siting of the proposed facility. Part (iv) is satisfied as no other private Illinois groups or individuals have intervened. The Jo Davies group has admitted its intervention is for the purpose of learning more about nuclear power and the proposed site. These interests clearly are not those of Runyon, Gogol or CANP, whose chief interests are protection of person, property and members, and education of petitioners and the general public. The Iowa intervenors represent concerns peculiar to Iowa. The State of Illinois cannot represent the private interests of these petitioners nor conduct the educational activities carried out by the same.

Finally, the decision of the Appeal Board in Detroit Edison Company (Greenwood Energy Center, Units 2 and 3) ALAB 476, NRC, CCH Nuclear Regulation Reporter §30,298.01 (1978) should be noted. In that case, the Appeal Board allowed an intervention petition filed 2 1/2 years late over the objection that the petition should have been denied as too late. In considering the 10 CFR 2.714(a) balancing test, the Appeal Board noted "the significance attached to the delay factor in striking a balance on all four." The Appeal Board further noted that the proceeding had been in limbo from its inception and ruled in "favor of the intervenor." "[The] proceeding still being at an incipient stage by reason of the applicant's own choice, we are hesitant to take CEE's lateness as enough cause to bar its participation. Indeed, it would be patently inequitable to do so unless it were clearly to appear that the three other factors weigh heavily in favor of rejecting the petition." As there could be only a de minimus delay by allowing petitioners herein to amend their contentions and as the proceedings are still at their inception, the 10 CFR 2.714(a) test should balance in favor of the petitioners.

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Purpose of Prehearing Conference

By the order dated 7/30/79, this Board ordered the 9/19/79 prehearing conference for several stated purposes, including: (to) "permit identification of key issues in the proceeding," and "to consider all intervention petitions" Among the purposes of the prehearing conference, is consideration of simplification, clarification and specification on the issues and the necessity or desirability of amending the pleadings. 10 CFR §2.752. At the 9/19/79 prehearing conference, petitioners and counsel indeed discovered the key issues and received clarification as to the demand for power and decommissioning issued (e.e. that they were withdrawn and would not be key issues). In light of the rulings on petitioners' contentions, it would appear that amending the pleadings would be both necessary and desirable. To allow such would be within the spirit and purpose of the prehearing conference

Conclusion

Under the circumstances of this case, as 1) leave to amend should be freely given, 2) additional time for filing contentions is permissible and 3) it would be within the spirit and purpose of the prehearing conference, petitioners respectfully submit that petitioners' motion for leave to file second amended petition should be granted.

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