UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
ARIZONA PUBLIC SERVICE COMPANY, ET AL.	)	Docket Nos. STN 50-592
	)	STN 50-593
Palo Verde Nuclear Generating Station, Units 4 & 5	)	

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been served upon the following listed persons by deposit in the United States mail, properly addressed and with postage prepaid.

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Dated: May 13, 1979

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
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ARIZONA PUBLIC SERVICE	)	
	)	
COMPANY, et al.	)	DOCKET NOS. STN 50-592
	)	
Palo Verde Nuclear Generating	)	STN 50-593
	)	
Station, Units 4 & 5	)	
	)	

JOINT APPLICANTS' RESPONSE TO THE PETITION FOR LEAVE TO INTERVENE OF THE ENVIRONMENTAL DEFENSE FUND

On May 7, 1979, joint applicants Arizona Public Service Company, Southern California Edison Company, El Paso Electric Company, San Diego Gas & Electric Company, Nevada Power Company, Department of Water and Power of the City of Los Angeles, City of Anaheim, City of Burbank, City of Glendale, City of Pasadena, and City of Riverside (the "Joint Applicants") received a copy of the petition for leave to intervene ("Petition") of the Environmental Defense Fund ("EDF") dated May 3, 1979. Two of the basic requirements for intervention are that (1) a petitioner demonstrate a personal interest in the proceeding and state how that interest will be affected by the results of the proceeding, and (2) the petition shall be filed no later than the time

specified in the notice of hearing. 10 C.F.R. § 2.714(a)(1), (2). Joint Applicants oppose the Petition on the grounds that EDF has failed to meet either of these requirements.

STANDING

The Commission's regulations in 10 C.F.R. § 2.714(a)(2) require that a petition for leave to intervene set forth with particularity the interest of the petitioner in the proceeding and how that interest may be affected by the results of the proceeding. Intervention as a matter of right in Commission licensing proceedings is governed by the judicial standing doctrine which requires a petitioner to allege both (1) "some injury that has occurred or will probably result from the action involved" to the person asserting it and (2) an interest "arguably within the zone of interest" protected by the statute invoked. Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, NRCI-76/12 610, 613-14 (1976).

An organization has standing to intervene if it can show that it or its members have an interest entitled to protection. See Allied-General Nuclear Services et al. (Barnwell Fuel Receiving and Storage Station), ALAB-328, NRCI-76/4 420 (1976). To establish its interest as an organization, EDF alleges that it is "dedicated to the protection and rational use of natural resources and to the preservation and enhancement of the human environment,"

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(Petition at 2-3), and that it has "a direct interest in minimizing the construction and operation" of central-station electric generating plants, (Petition at 5). EDF further alleges that it is "directly affected by the environmental and financial consequences of constructing and operating . . . nuclear power plants," (Petition at 5), and that it has "unique expertise and extensive experience" in the analysis of alternative energy sources and energy conservation measures, (Petition at 6).

In Sierra Club v. Morton, 405 U.S. 727 (1972), the Sierra Club sought to enjoin the granting of approval for the commercial development of a national game refuge adjacent to Sequoia National Park. The Sierra Club predicated its standing on its "special interest in the conservation and sound maintenance of the national parks, game refuges and forests of the country." Id. at 730. The U.S. Supreme Court held that the club lacked standing to maintain the suit. The basis for the Court's holding was that

> "a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA. The Sierra Club is a large and long-established organization, with a historic commitment to the cause of protecting our Nation's natural heritage from man's depredations. But if a 'special interest' in this subject were enough to entitle the Sierra Club to commence this litigation, there would

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> appear to be no objective basis upon which to disallow a suit by any other bona fide 'special interest' organization, however small or short-lived. And if any group with a bona fide 'special interest' could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so."

Id. at 739-40.

Sierra Club v. Morton was relied on in the Appeal Board's decision in Allied-General Nuclear Services, supra. Allied-General was a proceeding on an application for a materials license to receive and store irradiated fuel assemblies at a facility in South Carolina. The petition for leave to intervene in the proceeding was filed by the American Civil Liberties Union of South Carolina. The petition was founded largely upon that organization's asserted concern with, and "unique qualifications" to address, the "civil liberties issues" which it sought to raise. The Licensing Board concluded that allegations of that sort were insufficient to establish standing. LBP-76-12, NRCI-76/3 277, 286 (1976). The Appeal Board agreed that allegations founded upon an organization's asserted concern with and unique qualifications to address an issue which it seeks to raise are insufficent to establish standing, and so affirmed the denial of intervention. NRCI-76/4 at 421-23.

EDF's allegations respecting its concern with, and unique qualifications to address, the subject of alternative energy sources and conservation measures are similar in concept to the statements of interest offered in Sierra Club v. Morton and Allied-General. And based on the standards set forth in those cases, EDF's allegations are insufficient to establish standing in this proceeding.

Even assuming that EDF's allegations do establish a protectible interest, EDF has failed to particularize how its interest may be affected. All that EDF offers in this regard is that it is directly affected by the environmental and financial consequences associated with the construction and operation of nuclear power plants. EDF fails to describe any such consequences with specificity or to address how it would be affected. This failure to particularize leaves EDF without standing. See Portland General Electric Company, supra at 614; Allied-General Nuclear Services, supra at 422.

Although EDF has failed to establish standing on its own behalf, the question remains whether it may possess standing on behalf of its members. When an organization's standing is based upon the interest of its members, it must identify individual members, Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 2 Nuc. Reg. Rep. (CCH) ¶30,375.08 (April 4, 1979),

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describe specifically how their interests will be affected, Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-536, 2 Nuc. Reg. Rep. (CCH) ¶30,377.01 (April 5, 1979), and demonstrate that the members have authorized the organization to act on their behalf, Houston Lighting and Power Company, supra.

In its Petition EDF does identify two of its members who are alleged to live in the general vicinity of the Palo Verde site. Specifically, member Dora Jacobs is alleged to reside in Phoenix, Arizona, within the service district of Arizona Public Service Company and approximately 35 miles from the Palo Verde site, and member Valerie Melton is alleged to reside in Maricopa County, Arizona, within the service district of Arizona Public Service Company and approximately 12 miles from the proposed site. (Petition at 2). While persons who live in close proximity to a reactor site are presumed to have a cognizable interest in licensing proceedings involving that reactor, see Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 2 Nuc. Reg. Rep. ¶30,360.01 (January 26, 1979), there is no presumption that such individual will be affected by the proceeding. Houston Light[illegible]d Power Company, supra.

The only allegations offered by EDF respecting how

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the interest of its two members living near the site would be affected is that each of the two members resides within the service district of one of the Joint Applicants and that EDF's members are affected by the environmental and financial consequences of constructing and operating nuclear power plants. (Petition at 2, 5). If, by these allegations, EDF intends to imply that an economic interest of these two individuals will somehow be affected by virtue of their status as ratepayers of one of the Joint Applicants, the rationale would not serve to demonstrate that either of these two individuals is potentially aggrieved by the outcome of the proceeding. Neither the Atomic Energy Act nor the National Environmental Policy Act embraces within its "zone of interests" a petitioner's economic interest as a ratepayer of a utility applicant. Detroit Edison Company (Enrico Fermi Atomic Plant, Unit No. 2), ALAB-470, 7 NRC 473, 475 (1978).

With respect to the allegation that EDF's members are affected by environmental consequences, the Petition fails to describe with specificity any such consequences, and also fails to address how the interest of the two named Arizona members is affected by such consequences.

Finally, there is no indication in the Petition that either Ms. Jacobs or Ms. Melton wish to have their

interest represented by EDF in this proceeding. The question of whether a member of an organization must expressly have authorized the organization to represent his or her interest was considered by the Appeal Board in Houston Lighting and Power Company, supra. The Appeal Board concluded that such authorization was required. It added:

> "[M]ere membership in [the organization] does not ordinarily constitute blanket authorization for the organization to represent any of the member's personal interests it cares to without his or her consent."

Id. EDF does allege that its Petition was authorized in compliance with its bylaws and regular case approval procedures. (Petition at 4). This allegation, however, is not relevant to the question. Houston Lighting and Power Company, supra. The Appeal Board did note that authorization may be presumed in some instances. It cited as an example the situation where the sole or primary purpose of the organization was to oppose nuclear power in general or the facility at bar in particular. Id. The Petition of EDF does not present such a situation.

In summary, EDF has failed to demonstrate that it or its members have standing to intervene. Accordingly, the Petition should be denied on that basis.

UNTIMELY PETITION

The notice of hearing pertaining to the application by Joint Applicants for construction permits for Palo

Verde Units 4 & 5 was published by the Commission in the Federal Register (43 F.R. 19727-29) on May 8, 1978. That notice, among other things, provided that petitions for leave to intervene were to be filed by June 6, 1978. That notice went on to provide that because a complete Environmental Report had not been filed at that time, petitions for leave to intervene were not required to raise environmental issues by the June 6, 1978 deadline.

Thereafter, on December 8, 1978, the Atomic Safety and Licensing Board designated to preside in the Palo Verde Units 4 & 5 proceeding published a supplemental notice of hearing in the Federal Register(43 F.R. 57694-95) which provided that petitions for leave to intervene respecting environmental issues were to be filed by January 8, 1979. Based on this January 8, 1979 deadline, EDF's Petition was filed approximately four months late.

With respect to untimely petitions, 10 C.F.R. §2.714(a)(1) provides in pertinent part:

> Nontimely filings will not be entertained absent a determination by the Commission, the presiding officer or the atomic safety and licensing board designated to rule on the petition and/or request, that the petition and/or request should be granted based upon a balancing of the following factors in addition to those set out in paragraph (d) of this section:

(i) Good cause, if any, for failure to file on time.

(ii) The availability of other means whereby the petitioner's interest will be protected.

(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

(iv) The extent to which the petitioner's interest will be represented by existing parties.

(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

In its discussion of factor (i), EDF alleges that it filed its Petition as soon as it learned that the Commission Staff failed to give adequate consideration to conservation and other feasible alternative energy sources in the Draft Environmental Statement on the proposed Palo Verde Units 4 & 5. EDF has offered no reason why it could not have filed its petition in a timely manner. In Duke Power Company, (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-440, 6 NRC 642 (1977), the Appeal Board ruled that a petitioner who had relied on a state participating pursuant to 10 C.F.R. §2.715(c) to represent her interest in a proceeding could not rely on her dissatisfaction with the state's performance as a valid excuse for a late-filed intervention petition. Similarly, in Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC

760 (1977), the Appeal Board considered an untimely petition filed by a potential intervenor which was endeavoring to substitute itself for a prior participant which had withdrawn. The basic explanation offered by the potential intervenor for its late filing was simply that it had been "lulled into inaction" by the prior participant. The Appeal Board rejected this explanation as establishing "good cause."

The teaching of these cases is that one who sits on the sidelines in reliance on the expectation that an existing participant will adequately represent the non-party's interest assumes a risk that the existing participant's involvement in the proceeding will not fulfill the non-party's expectations. A foreseeable consequence of that risk is that the person who has delayed filing will not be permitted at a later time to become a party to the proceeding. Accordingly, it is clear that the reason offered by EDF is insufficient to establish good cause for the late filing. When a good excuse is lacking, the Commission has emphasized that the burden of justifying late intervention based upon the other four factors is considerably greater. Nuclear Fuel Services Inc., et al (West Valley Reprocessing Plant), CLI-75-4, NRCI-75/4R 273 (1975).

With regard to factor (ii), there are other means whereby EDF can protect its interest. For example, EDF may

make a limited appearance in the Palo Verde Units 4 & 5 proceeding under 10 C.F.R. § 2.715. In addition, EDF is free to submit its comments on the Draft Environmental Statement for consideration by the Commission Staff in preparing the Final Environmental Statement and by this Board in its review of that statement.

In its discussion of factor (iii), EDF alleges that it possesses "unique expertise and extensive experience" in analyzing alternative energy sources and energy conservation measures. (Petition at 6). EDF also refers to the "extensive research" which it has conducted over the last four years and the numerous legal proceedings in which it has participated and presented its results. (Petition at 3). While these allegations may incline one to infer that EDF would be able to assist in developing a sound record, what is even more striking is the absence of any allegation that EDF's extensive research and studies over the cited four-year period has ever prompted a state or federal agency in a specific case to adopt a EDF proposed alternative in lieu of the plan submitted by a utility applicant. Consequently, Joint Applicants remain unconvinced that EDF's participation in the Palo Verde Units 4 & 5 proceeding would be of assistance.

Factor (iv) requires the consideration of the extent to which EDF's interest will be represented by existing parties. The fact is, as EDF acknowledges, (Petition at

10), that the Commission Staff, which is deemed a party pursuant to 10 C.F.R. § 2.701(b), is obligated to consider alternatives to the construction of Palo Verde Units 4 & 5. It is EDF's contention that the Commission Staff's evaluation of alternative energy sources and conservation is not sufficiently comprehensive. (Petition at 7-8, 11). As noted by the Commission itself, however, evaluation of alternatives under the National Environmental Policy Act is subject to a "rule of reason", and application of that rule "may well justify exclusion or but limited treatment" of a suggested alternative. Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 540 (1977); see Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 100 (1977).

In addition to the Commission Staff, there are other participants in this proceeding which are concerned with alternative energy sources and conservation. First, the California Energy Resources Conservation and Development Commission ("California Energy Commission") is participating pursuant to the "interested state" provisions of 10 C.F.R. § 2.715(c). Among the California Energy Commission's powers and duties is the duty to analyze energy conservation measures and the availability of energy resources. California Public Resources Code § 25216. And in its Notice of Partici-

pation dated June 1, 1978, the California Energy Commission states that it is required under California law to undertake certain planning and forecasting for the California entities which are participating in Palo Verde Units 4 & 5. This planning and forecasting is stated by the California Energy Commission to include an assessment of additional power needs and resources.

Second, the California Public Utilities Commission (California PUC) is also participating under 10 C.F.R. § 2.715(c). In its petition for leave to participate, dated June 9, 1978, the California PUC states that joint applicants Southern California Edison Company and San Diego Gas and Electric Company are required to obtain a certificate of public convenience and necessity from the California PUC authorizing the utilities' participation in the Palo Verde Units 4 & 5 project. Among the factors which the California PUC considers in reviewing an application for a certificate are the need for new capacity and the availability of alternatives. See In re Southern California Edison Company 86 P.U.R.3d 482 (Cal.Pub.Util.Comm'n 1971).

In brief, there are at least three active participants in the Palo Verde Units 4 & 5 proceeding which are concerned with alternative energy sources and energy conservation measures. Accordingly, the contention set forth by EDF will be adequately represented without its participation.

Factor (v) clearly weighs against EDF. While EDF alleges that its participation will not delay the proceeding, a brief review of the schedule for completing the public hearing process as given in the Licensing Board's "Order Following Special Prehearing Conference" dated March 6, 1979, reveals that this cannot be so. Under the schedule developed by the Licensing Board, the first round discovery requests are to be filed by the parties within 30 days of issuance of the Draft Environmental Statement. The 30-day period will have run on May 21, 1979, and it is clear that EDF would be in no position to meet this deadline. Failure to meet this initial deadline would only result in further delays.

In summary, it appears that all five of the factors of Section 2.714(a)(1) weigh against granting EDF's Petition. Accordingly, the Petition should be denied as untimely.

Based on the foregoing, Joint Applicants submit that the petition for leave to intervene of EDF should be denied.

RESPECTFULLY SUBMITTED this 18th day of May, 1979.

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