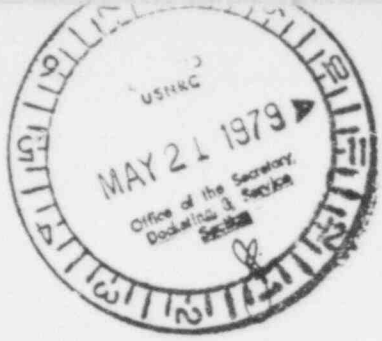

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
HOUSTON LIGHTING AND POWER COMPANY, ET AL.	)	Docket Nos. 50-498 50-499
	)	
(South Texas Project, Units 1 and 2)	)	
	)	

CITIZENS CONCERNED ABOUT NUCLEAR POWER'S, APPELLEE'S, RESPONSE TO APPLICANTS' BRIEF ON APPEAL FROM PREHEARING CONFERENCE RULING UPON INTERVENTION PETITIONS

325 021

May 14, 1979

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INTRODUCTION AND STATEMENT OF FACTS

Appeal is taken by Houston Lighting and Power Company, the City Public Service Board of San Antonio, Texas, Central Power and Lighting Company, and the City of Austin, Appellants, hereinafter referred to as Appellants, from a pre-hearing conference order issued on April 3, 1979, wherein Citizens Concerned about Nuclear Power (CCANP), hereinafter referred to as Appellee, was granted intervenor status.

The record reflects that on August 2, 1978, the Nuclear Regulatory Commission published notice in the Federal Register of the opportunity for a hearing and providing for an opportunity to file requests for leave to intervene at the licensing hearing for the South Texas Nuclear Project (43 Fed. Reg. 33968).

The filing deadline for petitions was September 1, 1978. Appellee filed their petition with the Nuclear Regulatory Commission on August 31, 1978.(Order,2). On October 23, 1978, the Atomic Safety and Licensing Board issued a memorandum and order regarding petitions for intervention providing that Appellee, pursuant to Rule 10 CFR Section 2.714 (a) (3) and Section 2.714 (b) could amend its original petition.

By order issued on November 17, 1978, the Atomic Safety and Licensing Board established January 11, 1978, as the pre-hearing conference date on intervention, thereby making December 26, 1978, the deadline for filing an amended petition. Appellee timely filed its amended petition on December 25, 1978 (Order, 3; Tr. 71).

The presiding officer of the Atomic Safety and Licensing Board specifically recognized this amended petition as entirely superseding the original petition that the amended petition would be the

only petition that Appellee would be working with (Tr. 71). Appellants did not take exception to the acceptance of this amended petition.

The record is uncontroverted that CCANP is a non-profit corporation "interested in providing education and influencing policy regarding issues surrounding the use of nuclear power" (Amended petition filed December 25, 1978). CCANP is specifically interested in the South Texas Nuclear Project (Tr. 72).

CCANP is comprised of members from at least Bexar and Matagorda Counties. Its membership is in excess of 120 individuals and it has specifically chosen not to identify all of its members for purposes of this proceeding (Tr. 75). CCANP was approached by citizens of Matagorda County who live within 25 miles of the South Texas Nuclear Project and at least four (4) of these citizens specifically asked CCANP to represent their interest (Tr. 72, 72, 75).

At the hearing held on January 11, 1979, the Licensing Board asked Appellee to file a statement from at least one person from Matagorda County authorizing Appellee to represent his/her interests (Tr. 75). The Licensing Board also requested that Appellee file a statement that the person who appeared at the hearing and signed the amended petition had the authority to do so.

Appellee filed an authorization signed by its two coordinators on January 19, 1979. On January 14, 1979, Mr. Bunk filed a letter with the Licensing Board.Mr. Bunk's letter specifically stated "My home and property are within seven (7) miles of the South Texas Nuclear Project. I am a member of Citizens Concerned about Nuclear Power (CCANP). I desire that CCANP represent my interest in the proceedings .... I adopt and support the statements of interest

and contentions delineated in CCANP's amended petition dated 12/25/78."

The Licensing Board decided that Appellee "has a real stake" in the licensing proceeding and has demonstrated standing of right to participate (Order, 19).

It further found that Appellee had two contentions that were admissible.

ARGUMENT

10 CFR 2.714a (c) states in relevant part that "an order granting a petition for leave to intervene ... is appealable ... on the question whether the petition ... should have been wholly denied."

It is a well established rule that the standard for review on appeal of a licensing board's order that either grants or denies intervention is whether or not the board abused its discretion. Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2) ALAB 339 4 NRC 20 (1976); Florida Power and Light Company (St. Lucie Nuclear Power Plant, Unit 2), ALAB 420, 6 NRC 8, 13 (1977); Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant) CLI-75-4, 1 NRC 273 (1975).

The Appellants have the affirmative burden to show this Appellate Board the specific basis upon which the Licensing Board abused its discretion and must limit its allegations of abuse of discretion to the specific elements set out in 10 CFR 2.714. All other errors urged are outside the scope of review at this time. Public Service Company of Indiana, Inc., supra; Toledo Edision Company (Davis Bessie Nuclear Power Station) ALAB 300 2 NRC 752 (1975).

I. THE LICENSING BOARD DID NOT ABUSE ITS DISCRETION IN GRANTING INTERVENTION TO APPELLEE.

A. APPELLANTS HAVE NOT BROUGHT FORWARD FOR CONSIDERATION ON APPEAL THE TIMELINESS OF APPELLEE'S PETITION

Appellants' brief established as its major premise that each organization which filed a petition to intervene was either "expressly found to be or expressly assumed to be untimely" (Brief 5, see 3). Therefore, "the validity of the grant of each of the petitions to intervene turns ... upon whether the Licensing Board abused its discretion in balancing the factors ...." for untimely petitions. Appellants' major premise is erroneous and miscontrues the order entered by the Licensing Board on April 3, 1979.

The sole basis for Appellants' major premise is a footnote found on page 19 of the Order wherein the Board states

> ... assuming (although not deciding) both that the CCANP petition must be considered untimely and that there was no good cause for a delay to that date, we balance the relevant factors in 10 CFR Section 2.714 (a) in favor of CCANP's admission. In terms of these factors, the petition would differ from that of CEU, which we are granting (pp. 62-63, infra), only in that (1) it was not as late and (2) the contentions differ. (emphasis supplied)

It is clear the Board is responding to an argument set forth by Appellants as to when Mr. Bunk became a member of CCANP and assumes hypothetically that CCANP was untimely and could not show good cause. The Board then goes on to conclude CCANP would have still qualified for intervention under these hypothetical conditions. The Board made these assumptions only for purposes of this footnote and specifically did not make these assumptions as part of the decision. 325 023

If this footnote be given the full force and effect of an alternative holding of the Licensing Board, then it must be read in its entirety to include the holding that "CCANP is likely to assist us in resolving its two contentions which we have admitted" which would be a basis for granting discretionary intervention. When there is more than one alternative theory to uphold the ruling of the Licensing Board then either theory can serve as a basis for upholding the Licensing Board decision. Appellants do not brief the question of discretionary intervention and their appeal would be denied because a valid uncontested basis exists to grant intervention.

A further basis exists for showing that the Appellants misconstrued the Order. 10 CFR Section 2.714 (a) states in relevant part that

> Non timely filings will not be entertained absent a determination by the Commission, the presiding officer, or the Atomic Safety and Licensing Board ... that the petition and/or request should be granted based upon the balancing of the following factors in addition to those set out in paragraph (d) of this section.

If the Board makes a determination that a petition is untimely, then it must specifically consider the five elements specified in section (a). No consideration of these elements was undertaken by the Board in its decision as it related to Appellee. Therefore, it is an inescapable conclusion that the Board determined that Appellee timely filed a petition to intervene.

This conclusion is further documented by the Board's Order which recognized that Appellee's original petition was timely filed (Order 2). (It should be noted that Appellants do not contest that Appellee's original petition was timely filed and in fact refer to it as the "original timely filed petition" (Brief, 3)). The Licensing Board found

that Appellee had an absolute right to amend their petition on or before December 26, 1978, and that the Appellee timely did so (Order, 3; Tr. 71). Appellants do not contest anywhere in their brief the timeliness of Appellee's amended petition.

Whether or not Appellants misconstrue the Board's Order as to the timeliness of Appellee's petition, one conclusion is mandatory. Since Appellants argue that the Licensing Board assumed that Appellee's petition was untimely it would be a non sequitur to argue that the Licensing Board abused its discretion in finding that Appellee's petition was timely. Based on Appellants' own argument it is logically inescapable that Appellants did not bring forward for consideration on appeal whether or not the Licensing Board abused its discretion in finding that Appellee's petition was timely.

It is axiomatic that that which is not briefed is waived on appeal and must be expressly found in favor of Appellee. Consumers Power Company (Midland Plant, Units 1 and 2) ALAB 270 1 NRC 473 (1975); See Long Island Lighting Company (Shoreham Nuclear Power Station) 831, 832-33 (1973) ALAB-156, 6 AEC.

Even if Appellants had raised on appeal the contention that the Licensing Board abused its discretion in finding the petition timely, this contention would be without merit. The United States Supreme Court has translated the abuse of discretion standard to mean there must only be "substantial evidence in the record to support the decision of the Licensing Board. NLRB v. Columbian Enameling and Stamping Company, 306 U.S. 292, 300, 59 S. Ct. 501, 505, 83 L. Ed. 660 (1939). The record is replete with "substantial evidence" which is uncontroverted that Appellee's petition was timely filed.

Appellee timely filed its original petition (Order, 2). The

rules of practice provide for an absolute right to file an amended petition prior to fifteen (15) days of the pre-hearing conference. 10 CFR 2.714 (a) (3) and (b).

Appellee filed an amended petition withi. he permissible time frame (Order, 3; Tr. 71). The representatives of Appellee at the hearing on January 11, 1979, specifically asked the Licensing Board to consider its amended petition as a complete substitute for its original petition (Tr. 71). The representative explained to the Licensing Board that the individual who had prepared the original petition had made several errors, including the ages of members of Appellee and location of members of Appellee (Tr. 71). The Board accepted the amended petition as a substitute for the prior petition (Tr. 71). Appellants did not except to the acceptance of the amended petition. An amended petition supersedes an original petition and relates back to the date of filing of the original petition (See Rule 15 of the Federal Rules of Civil Procedure).

The sworn affidavit of the representative of the Appellee stated the representative had personal knowledge that Appellee had at least four (4) members residing within 15 to 25 miles of the South Texas Nuclear Project, one of whom was Mr. Bunk. No contraverting affidavits were filed. Uncontroverted affidavits must be taken as true on appeal. Florida Power and Lighting Company, supra.

Mr. Bunk's letter which is uncontroverted states that he is a member of Appellee's organization and desires them to represent his interests.

The record also shows the Appellee's organiation was formed in February, 1978, (Tr. 71) and many citizens of Matagorda Coun+/ had approached Appellee's organization to become members (Tr. 71).

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The record shows that there is substantial evidence to support a finding, if it had been contested, that Appellee timely filed a petition.

The extensive exhortations in Appellants' brief that further inquiry into Mr. Bunk's status as it relates to his membership in Appellee's organization is not reviewable by appeal at this time. Public Service Company of Indiana, Inc., supra; Toledo Edison Company, supra.

On March 14, 1979, Appellants filed a motion for supplemental proceedings pursuant to rule 10 CFR 2.730. The motion specifically requested the Licensing Board to inquire of Mr. Bunk as to the date on which he joined Citizens Concerned about Nuclear Power. This request was denied in the Licensing Board's Order (Order p. 67). Appellants did not urge this question be certified to the Commission, pursuant to 10 CFR 2.718 (i). The Appellants did not request the Appellate Board to certify the question. The Licensing Board in its discretion did not refer this question for review by the Commission, pursuant to 10 CFR 2.730 (f). Thereforethis question is not properly before this Appellate Board for review. See Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2) ALAB 271 1 NRC 478 (1975); Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station) ALAB 421 6 NRC 25 (1977).

Further it is clear that the nature of this inquiry would be to obtain discovery. An Appellate Board consisting of Salzman, Buck, and Farrar stated that any limitation on the right to discovery at a pre-hearing on intervention was interlocutory and not appealable, pursuant to 10 CFR 2.714a. Public Service Company of Indiana, Inc., supra. The scope of any inquiry as to Mr. Bunk is not reviewable on appeal at this time.

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Appellants' reliance on Washington Public Power Supply System (WPPSS Unit 2), LBP-79-7, 9 NRC (1979) for the proposition that further questions must be asked of Mr. Bunk is misplaced. This case is distinguishable in several significant ways. In that decision, unlike the case at bar, there was uncontroverted and affirmative showing that an individual was not a member of an organization at the time the organization's petition was filed. Secondly, to have that case identical to the case at bar, this Appellate Board would have to assume evidence not in the record and would have to assume answers to questions proposed of Mr. Bunk, which is not permissible by an Appellate Board.

Third, this case does not stand for the proposition that it would be an abuse of discretion to not inquire beyond an amended petition, an affidavit, and a letter to make additional finding about an individual's relationship with an organization.

Fourth, the question of whether or not the intervenor's petition was timely was directly before the Appellate Court for review which is not true with the case at bar.

Fifth, neither party in the aforementioned case was attempting to appeal a denial of development of further facts or discovery, which is precisely what is attempted to be appealed in this case.

B. APPELLEE HAS STANDING AS A MATTER OF RIGHT.

An organization can establish standing through a member or members of the organization who have interests which may be affected by the outcome of the proceeding. NAACP v Button 371 U.S. 415, 83S. CT.

328 9L.ed.2D405 (1963); Cady v Morton, 527 F.2d 786 (1975); Sierra Club v Morton, 514 F.2d 856 (1975); Coalition for Environment v Volpe, 504 F.2d 156 (1974); San Francisco Tomorrow v Romney, 472 F.2d 1021 (1973); Sierra Club v Mason 351 F.Supp 419 (1974); Public Service Company of Indiana, supra at 330.

Further, in proceedings before the Nuclear Regulatory Commission, it is permissible for an organization to represent individuals who are not members upon the presentation of proof that these individuals give their express authority for that organization to represent them. Long Island Lighting Company, supra; Gulf States Utilities Company (River Bend Units 1 and 2), ALAB-183, 7 AEC 222, 223 n.4 (1974); Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station), LBP-75-60, 2 Nrc 637, 690 (1975).

When an organization claims that its standing is based on the interests of its members, 10 CFR Section 2.714 provides that the organization must identify specific individual members whose interest might be affected by the proposed action, describe how the interest of each of those members might be affected and show that each of those members has authorized the organization to act on his/her behalf.

Appellee has satisfied this requirement by identifying in a sworn affidavit the names and addresses of four (4) members living within the "geographical zone of interest." (Although not an issue before this Appellate Board, limiting the geographical zone of interest to fifty (50) miles might be an unrealistic limitation in light of the plume diagrams for the Three Mile Island accident.)

Additionally Appellee provided a statement from Mr. Bunk wherein he adopted the views and contentions of Appellee's petition and specifically authorized Appellee to represent him.

Appellants urge on appeal a standard for standing that goes beyond the requirements of 10 CFR 2.714 and the prior case law promulgated by the Nuclear Regulatory Commission. Appellants urge that the Licensing Board must additionally consider the individual's relationship to the organization seeking intervenor status in terms of distance and correspondence of interests, alleging that a nexus must exist between the member and the group in terms of location and common interest.

There is absolutely no case law supporting this proposition. The Commission's case law on standing is clear, unequivocal, and straightforward. When an organization seeks to establish standing through the interests of its members, it need only identify a member who has the requisite affected personal interest and supply a specific authorization or some other concrete indication that in fact the member wishes to have that inerest represented in the proceeding by the organization. Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535 9 NRC ___, ___ (April 4, 1979) (Slip op. pp. 24, 36-38); Allied General Nuclear Services (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420, 422-23 (1976); Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-322, 3 NRC 328, 330 (1976); Public Service Electric and Gas Company (Salem Nuclear Generating Station, Units 1 and 2), ALAB-136, 6 AEC 487, 489 (1976); Duquesne Light Company (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 244, n.2 (1976).

The critical focus is whether or not the individual has given his express authority for the organization to represent his interests. The Appellate Board in Allens Creek, supra, at 36 stated

that when a member authorizes the organization to represent his interests, he clothes the organization with his personal standing. Appellants concede that Mr. Bunk is within the zone of interest and would have standing in his own right (Brief, 20). It is clear that the record in this case shows the Licensing Board determination that Appellee had standing as a matter of right is neither irrational nor is it an abuse of discretion.

The analysis used by Appellants is replete with spurious logic; it calls for standards that are unmanageable and fraught with severe policy implications.

Appellants constantly refer to Appellee's original petition. Appellees at the hearing informed the Licensing Board that its original petition contained numerous errors. Appellee filed an amended petition which superseded the original petition in all aspects and which the Licensing Board specifically recognized as so doing. All references by Appellant to Appellee's original petition are of no probative value.

Appellants then go forward and attach some significance to the fact Appellee filed an amended petition. Filing an amended petition is totally permitted by the rules and can have absolutely no legal significance for purposes of appeal on review of a Licensing Board's decision.

Appellants then argue that Appellee mentioned members in only two counties. Query: How many counties must you have members in? Is there any statement by Appellee that it does not have members in other counties?

Appellants argue that a "local organization" based in one area cannot be permitted to represent individuals in a more distant area.

First of all, Mr. Bunk lives within one hundred and forty miles of San Antonio, Texas is the second largest state in the United States. The City of Houston alone is fifty (50) miles across. A hundred and forty miles in Texas can hardly be determined to be remote. The standard as proposed by Appellants is totally unmanageable. What is deemed to be a remote area? Is seventy-five (75) miles too remote? How does one determine what is "a local organization" or a "national organization"? The standard is totally unmanageable.

The reason that Appellants can find no case which inquires into the geographic residence of an organization's members is that such an inquiry would be Constitutionally impermissible. Any limitations imposed on the number of mmebers of an organization and the geographic location of the members of an organization would be an infringement prohibited by the First Amendment guarantee of freedom of association. Gibson v Florida Legislative Investigation Committee, 372 US539,83S.CT.889,9L.ed.2d.929 (1963); NAACP v Button 371US415,83S.CT.328, 9L. ed.2D405 (1963); Bates v Little Rock 361US516,80S.CT.412, 4L.ed.2D480 (1960); NAACP v Alabama, 357US449, 78S.CT.1163, 2L.ed. 2D1488 (1958). In NAACP v Button, supra, the Supreme Court recognized that it is permissible for citizens to speak to other citizens to urge them to come forward and express their rightsprotected by law and to encourage them to join in an organization and let that organization represent them in thatexpression. By analogy it would be permissible for CCANP to go to various areas of the state and encourage people to challenge the safety and hazards of nuclear energy as is their legal right and to let CCANP be their representative. That was not in fact done in this case. But even if it

were ... would be protected by the United States Constitution as a valid First Amendment right of association. Just as the NAACP is Constitutionally permitted to represent a single claim of discrimination by a single member of its organization, CCANP can represent a single claim that the South Texas Nuclear Project represents a threat to the life, health, safety, and property of Mr. George Bunk, a single member of its organization.

The record in this case clearly demonstrates that the Licensing Board did not abuse its discretion in granting intervenor's status to Appeliee. Further, Appellee has standing because the laws enacted by Congress and the Constitutional guarantees in a democracy compel the participation of its citizens in the protection of their rights.

Respectfully submitted,

Steven A. Sinkin
Attorney for Citizens Concerned
About Nuclear Power, Appellee

May 14, 1979

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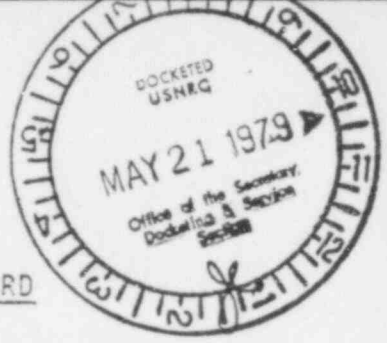

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CERTIFICATE OF SERVICE

I hereby certify that Appellee's Motion to Reconsider and Appellee's Reply Brief in the above captioned proceding have been served on the following by deposit in the United States Mail on this the 14th day of May, 1979.

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