UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



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

JOINT APPLICANTS' RESPONSE TO THE REPLY OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION TO JOINT APPLICANTS' RESPONSE TO PETITION FOR LEAVE TO INTERVENE OF THE ENVIRONMENTAL DEFENSE FUND

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") recently received a copy of the above-referenced Reply to the California Public Utilities Commission ("CPUC"), dated May 24, 1979. Joint Applicants submit that CPUC's Reply should be rejected on the grounds that neither Section 2.714 nor any other section of the Commission's Rules of Practice permit a reply to a party's answer to a petition for leave

to intervene. Section 2.706 does permit a reply to an "answer," but the answer there referred to is one to a notice of hearing under Section 2.705.

Even though CPUC's Reply should be rejected as not being permitted under the Commission's Rules of Practice, Joint Applicants wish to comment briefly on CPUC's Reply as it may affect the interests of Joint Applicants.

I

In Part I of its Reply CPUC states that Joint Applicants' Response to the Petition for Leave to Intervene of the Environmental Defense Fund ("EDF") was untimely filed. As support for its assertion, CPUC purports to quote 10 C.F.R. § 2.714(c) pertaining to the timing of an answer to a petition for leave to intervene. (Reply at 1). There are two problems associated with CPUC's evaluation of the timing of Joint Applicants' Response. First, CPUC has quoted and applied an outdated regulation. Second, CPUC has failed to consider other portions of the Commission's Rules of Practice respecting the filing of documents and the computation of time.

Section 2.714(c), as amended effective May 26, 1978 (43 Fed. Reg. 17798, April 26, 1978), and January 22, 1979 (44 Fed. Reg. 4459, January 22, 1979), provides in pertinent part as follows:

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> "Any party to a proceeding may file an answer to a petition for leave to intervene within ten (10) days after service of the petition."

In addition, under Section 2.710,

> "[w]henever a party has the right or is required to do some act or take some proceeding within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, five (5) days shall be added to the prescribed period."

Service upon a party by mail is complete on deposit in the United States mail, properly stamped and addressed. 10 C.F.R. § 2.712(d)(3). And filing by mail is deemed to be complete as of the time of deposit in the mail. Id. § 2.701(c).

Summarizing the above, when a party to a proceeding is served by mail with a petition for leave to intervene, the party has 15 days, measured from the date of service, in which to file an answer. In the case of Joint Applicants' Response to the Petition for Leave to Intervene of EDF, the Petition was served on May 3, 1979, and the Response was filed on May 18, 1979, or fifteen (15) days later. Therefore, Joint Applicants' Response was filed in a timely manner.

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II

In part III of its Reply, CPUC questions Joint Applicants' reference to Sierra Club v. Morton, 405 U.S. 727 (1972), as support for the argument that EDF lacks standing to intervene. CPUC specifically questions whether the basis for determining standing in a Federal court should apply to a Commission proceeding, and also whether the "salient findings" of Morton are pertinent to the Palo Verde Units 4 and 5 proceeding. Not only does CPUC fail to provide any reasoning as to why the standard in Morton should not be applied in a Commission proceeding, but it also fails to identify the "salient findings" of Morton, or discuss why such findings would not be pertinent. More significant, CPUC simply ignores the Commission's adoption of the judicial standing doctrine, see Portland General Electric Company (Pebble Springs Nuclear Units 1 and 2) CLI-76-27, NRCI-76/12 610 (1973), and the frequent application of Morton by the Commission and the Appeal Board, see, e.g., Edlow International Company (Application to Export Special Nuclear Material), CLI-76-6, NRCI-76/5 563 (1976); Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 2 Nuc. Reg. Rep. (CCH) ¶30,375 (April 4, 1979); Allied-General Nuclear Services, et al. (Barnwell Fuel Receiving and Storage Station), ALAB-328, NRCI-76/4 420 (1976).

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CPUC criticizes Joint Applicants' analysis of whether EDF possesses standing on behalf of its members. CPUC states that "[a]ttempting to dissect the precise interest of each of [EDF's] members . . . would appear fruitless, hypertechnical and unnecessary." (Reply at 2). This statement by CPUC leads Joint Applicants to conclude that CPUC is uninformed respecting the criteria used by the Commission in determining organzational standing. It is not essential, nor have Joint Applicants maintained, that the interest of each of EDF's members be identified. It is essential, however, that when an organization seeks to establish standing on behalf of its members, at least one member be identified who has an interest which may be affected by the outcome of the proceeding. As stated by the Appeal Board in Houston Lighting and Power Company, supra:

> "It is patent from the foregoing that, in determining the Guild's standing, the Licensing Board was not merely entitled but obligated to satisfy itself that there was at least one member of the Guild which might be affected by the outcome of the proceeding."

2 Nuc. Reg. Rep. at ¶30,375.08.

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CPUC also criticizes Joint Applicants' insistence that an identified member of an organization normally must authorize the organization to represent his interests in the

proceeding. It is alleged by CPUC that "a member of the Bar would need to take whatever steps necessary with his client before representing or making assertions on their behalf." (Reply at ). Here, too, CPUC simply ignores the recent decision in Houston Lighting and Power Company, supra, in which the Appeal Board specifically addressed the issue of whether authorization is required. In addition, CPUC apparently does not appreciate that it is an organization which is seeking to intervene and not certain individuals. The "client" being represented is EDF and not the identified members living in Arizona. Where the client-organization hinges its standing upon its being the representative of a member who has the requisite affected personal interest, it is necessary that the member authorize the organization to represent his interests. 2 Nuc. Reg. Rep at ¶30,375.08.

III

Part IV of CPUC's Reply is directed toward Joint Applicants' analysis of the untimeliness of the EDF Petition. CPUC's primary assertion is that "[t]he Board has discretion to allow intervention based upon a concern discerned from the DEIS." (Reply at 3). While a licensing board certainly does have the discretionary power to permit intervention, Joint Applicants are unaware of any authority, nor has CPUC cited any, which supports the assertion that identifying a "concern discerned from the DEIS" constitutes a basis for the licensing board's exercise of its discretion.

CPUC also asserts its belief that EDF could assist in developing a sound record. Even if the Licensing Board makes a positive finding on EDF's ability to contribute, that in itself would be an insufficient basis on which to grant EDF's untimely Petition or to permit EDF to intervene as a matter of discretion. As stated by the Commission in Portland General Electric Company, supra, factors bearing on the exercise of a licensing board's discretion are suggested by the Commission's regulations, particularly those governing a determination on late intervention, 10 C.F.R. § 2.714(a), and the more general factors of 10 C.F.R. § 2.714(d) concerning ruling on a petition to intervene. These factors have been analyzed by Joint Applicants in detail in their Response to EDF's Petition. The unavoidable conclusion to be drawn from that analysis is that EDF's situation is not an instance where intervention should be granted as a matter of discretion.

IV

In Part V of its Reply, CPUC takes issue with Joint Applicants' statements that CPUC's concern with alternative energy sources and conservation measures provides a basis for concluding that EDF's interest will be represented by an existing participant. CPUC asserts that the issue which EDF wishes to raise may be different from CPUC's "statement of issues." (Reply at 4).

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CPUC indicates that in order to conclude that a petitioner's interest will be represented by an existing participant, it would be necessary for the existing participant to have raised the identical issues as the petitioner and to be offering the identical proof as the petitioner. If CPUC's interpretation of 10 C.F.R. § 2.714(a)(1)(iv) were to be applied, it would be practically impossible for a licensing board to ever conclude that a petitioner's interest will be represented by an existing participant. It would be rare indeed for a licensing board to know at the time that it is ruling on petitions to intervene what proof will be offered by a participant or would be offered by a petitioner. For this and other reasons, subsection 2.714(a)(1)(iv) does not require identical proof. Nor is it necessary that the statements of issues by the existing participant and the petitioner be identical. Factor (iv) of subsection 2.714(a)(1) weighs against a petitioner if the issues desired to be raised are similar to those raised by an existing participant such that a licensing board can conclude that the petitioner's interest will be represented.

If this Licensing Board believes it essential to know the specific issues which CPUC intends to raise prior to determining the extent to which EDF's interest will be represented by CPUC, Joint Applicants are not opposed to this Board's deferring ruling on EDF's Petition until CPUC

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submits its statement of issues. The time when this statement is due is 60 days after issuance of the Draft Environmental Statement.

Even if this Board finds that EDF's interest would not be adequately represented by CPUC, there are, as specified in Joint Applicants' Response to EDF's Petition, at least two other participants which will represent EDF's interest. And even if this Board finds that EDF's interest will not be adequately represented by any existing participant, the other four factors of Section 2.714(a)(1) still weigh against granting EDF's Petition.

CONCLUSION

The Reply of CPUC should be rejected on the grounds that the Commission's Rules of Practice do not permit the filing of such a document.

On the merits, CPUC's Reply is defective in that CPUC makes assertions based on outdated regulations, ignores other regulations which defeat its position, ignores several Commission and Appeal Board decisions which directly support Joint Applicants' Response to EDF's Petition, and makes unrealistic arguments respecting the interpretation of the Commission's regulations.

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RESPECTFULLY SUBMITTED this 8th day of June, 1979.

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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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