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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
) Docket No. 50-341
THE DETROIT EDISON COMPANY) (Operating License)
(Enrico Fermi Atomic Power)
Plant, Unit No. 2))

APPLICANTS' CONSOLIDATED ANSWER TO
INTERVENTION PETITIONS OF MARTHA AND DAN DRAKE
AND CITIZENS FOR EMPLOYMENT AND ENERGY

Introduction

On October 22, 1974, The Detroit Edison Company filed an Amended and Substituted Application for a facility operating license for the Enrico Fermi Atomic Power Plant, Unit No. 2 ("Fermi 2"). On March 17, 1978, that application was amended to add as co-owners and co-applicants Northern Michigan Electric Cooperative, Inc. and Wolverine Electric Cooperative, Inc. (referred to together with The Detroit Edison Company as "Applicants"). Notice of opportunity for hearing on the joint application was published by the Nuclear Regulatory Commission ("Commission") in the Federal Register on September 11, 1978. 43 Fed. Reg. 40,327 (1978). That notice afforded "any person whose interest may be affected by this proceeding" an opportunity to file

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a request for a hearing in the form of a petition for leave to intervene. The notice further provided that any such request must be filed by October 10, 1978.

As counsel for Applicants, we received on October 10, 1978, a copy of a petition to intervene in this proceeding filed by Mrs. Martha Drake. The petition purports to seek intervention on behalf of Mrs. Drake and also on behalf of her son, Mr. Dan Drake. On October 12, 1978, Applicants received a copy of a petition to intervene filed by Citizens for Employment and Energy ("CEE"). CEE's petition was filed on October 9, 1978.

In Applicants' view, neither the joint Drake petition nor the CEE petition set forth with particularity, as required by 10 C.F.R. § 2.714, the interest of the petitioners in the proceeding. Similarly, neither petition explained how that interest might be affected by the results of the proceeding. Accordingly, on October 20, 1978, Applicants filed a motion seeking, inter alia, leave to commence limited discovery against certain of the petitioners to clarify the issue of standing. On November 13, 1978, this Board issued an order denying Applicants' motion and extending until November 22, 1978 the time in which to answer the intervention petitions.

Pursuant to 10 C.F.R. § 2.714(c) and this Board's November 13 order, Applicants submit herewith their con-

solidated answer to each of the above-identified petitions. In sum, Applicants agree with the Commission Staff that both of the intervention petitions should be denied because neither establishes that intervention should be granted either as a matter of right or as a matter of discretion.^{1/}

Argument

I.

THE JOINT DRAKE PETITION FAILS TO SATISFY THE REQUIREMENTS FOR INTERVENTION EITHER AS OF RIGHT OR DISCRETION AND SHOULD THEREFORE BE DENIED.

A. Intervention as a Matter of Right

The joint Drake petition recites that both Mrs. Martha Drake and Mr. Dan Drake are individually seeking intervention. Petitioners allege that they are residents and citizens of the State of Michigan and that they are members of one of the cooperatives that is a co-owner of

^{1/} Applicants note that both the joint Drake petition and the CEE petition attempt to include contentions. In its order of November 13, this Board has permitted the petitioners until December 4, 1978 in which to file complete lists of their respective contentions and the specific bases for such contentions. Applicants anticipate that the petitioners will add to or modify their present pleadings by that date. Applicants therefore propose to withhold their response to the Drake and CEE contentions until such contentions have been finally amended, but will file their response in advance of the December 18, 1978 Prehearing Conference.

Fermi 2. In addition, it is claimed that Dan Drake lives within 50 miles of the Fermi 2 site. The petition also asserts that "the whole state will be affected by the safety and economic health of the plant." Each of the petitioners' alleged interests is discussed below.

It appears that Mrs. Drake's assertion of standing is based primarily on the fact that she is a member of a cooperative arguably economically affected by the construction of Fermi 2. Although Mrs. Drake claims membership in a cooperative that is a co-owner of the facility, it is clear that she is a member of the retail cooperative, Top O'Michigan, Inc., which in turn buys power from Northern Michigan Electric Cooperative, one of the Applicants.^{2/} Presumably, the "injury" on which Mrs. Drake relies for standing is her putative economic harm as a member and ratepayer of the retail cooperative. It is, however, well established that status as a ratepayer will not confer standing in a license proceeding. Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614 (1976); The Detroit Edison Company (Greenwood Energy Center, Units 2 and 3), ALAB-376, 5 NRC 426, 428 (1977). Moreover, this

^{2/} See The Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit No. 2), ALAB-470, 7 NRC 473, 474 (1978).

exclusion has been extended specifically to derivative ratepayers, who, like Mrs. Drake, are ratepayers of customers of applicants. Public Service Company of Oklahoma (Black Fox, Units 1 and 2), LBP-77-17, 5 NRC 657, 666 (1977), aff'd as to this point, ALAB-397, 5 NRC 1143, 1147 (1977); Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1420 & n.3 (1977). Thus, Mrs. Drake's interest as a ratepayer once-removed is legally insufficient to justify intervention. Her economic interest is not within the "'zone of interests' protected by the Atomic Energy Act." ALAB-397, supra at 1147.

Indeed, during a related proceeding, the Appeal Board rejected Mrs. Drake's identical claim. The Appeal Board there determined that "neither the Atomic Energy Act nor the National Environmental Policy Act embraces within its 'zone of interests' economic concerns even remotely akin to those which Mrs. Drake would press as a member and ratepayer of a cooperative that purchases power from a Fermi co-owner." The Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit No. 2), ALAB-470, 7 NRC 473, 475 (1978) (footnote omitted). Mrs. Drake has made no new allegations in her instant petition which justify a different result.

Mrs. Drake also apparently alleges that as a resident and citizen of Michigan her "safety and economic health" will be affected by the Fermi 2 plant. Even assuming that Fermi 2 could have any impact on a Michigan resident some 300 miles from the site,^{3/} such an interest is merely a "generalized grievance", undifferentiated from that of any other citizen, and thus insufficient to support intervention. Edlow International Company (Agent for the Government of India), CLI-76-6, 3 NRC 563, 576 (1976). In short, she resides at too great a distance from the facility to predicate standing on this interest. Compare Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 n.4 (1977) (50 miles) with Dairyland Power Cooperative (LaCrosse Boiling Water Reactor), ALAB-497, 8 NRC ____ (Sept. 20, 1978) (75 miles).

Dan Drake's articulated interest -- even assuming he is the real party in interest^{4/} -- is similarly

^{3/} Mrs. Drake alleges she resides in Petoskey, Michigan, some 300 miles from the Fermi 2 site.

^{4/} Although the joint petition recites that "[t]hey claim standing on the grounds that Dan lives within 50 miles of the plant" (emphasis added), it is beyond dispute that Mrs. Drake cannot bootstrap her own standing with allegations of her son's standing. See Fermi 2, supra at 474-75 n.1. More important, Dan Drake must independently assert his own interests. To the contrary, Dan Drake did not sign the

insufficient to warrant intervention. The petition alleges that Mr. Drake resides in Ann Arbor, Michigan, approximately 50 miles from the Fermi 2 site. The petition, however, fails to particularize his interests and fails to explain how those interests will be affected by this proceeding. Moreover, as is clear from Mrs. Drake's intervention papers in the Fermi 2 Construction Permit Amendment proceeding,^{5/} Dan Drake is a student -- and thus may not even live in the vicinity of the site at the time the plant commences operation. Cf. Watts Bar, supra, at 1421-22 n.4. He has likewise failed to identify the specific aspect of the proceeding as to which he seeks to intervene. 10 C.F.R. § 2.714(a)(2). Accordingly, the petition is defective and should not justify his intervention as a matter of right.

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petition and has given no indication of a personal desire to intervene. To Applicants' knowledge Mr. Drake has also not joined in Mrs. Drake's repeated attempts to oppose construction and operation of the Fermi 2 facility. See, e.g., Drake v. The Detroit Edison Co., 443 F. Supp. 833 453 F. Supp. 1123 (W.D. Mich. 1978); The Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit No. 2), ALAB-475, 7 NRC 752, 754 (1978) (antitrust), ALAB-470, supra at 474 (construction permit amendment proceeding). Mrs. Drake also filed at least one petition pursuant to 10 C.F.R. § 2.206 (Nov. 19, 1977), and intervened in proceedings before the Michigan Public Service Commission.)

5/ See Amended Petition of Martha G. Drake, NRC Docket No. 50-341, filed February 1, 1978. A copy of this intervention petition was attached to Applicant's October 20 Motion to Commence Limited Discovery.

B. Intervention as a Matter of Discretion

Even though a prospective intervenor may not be entitled to intervene in a proceeding as a matter of right, a Licensing Board may grant intervention as a matter of discretion. Pebble Springs, supra at 616. However, the inquiry as to whether discretionary intervention should be granted in this case must focus on one "pivotal factor" -- "the ability of the petitioner to make a valuable contribution to the development of a sound record." ALAB-397, supra at 1151 n.4.

The joint Drake petition asserts that the petitioners "can contribute to a full hearing" and that a full hearing cannot be had without a "cooperative member from northern Michigan". These assertions, without more, in no way establish that the petitioners can make a valuable contribution to the decision-making process. Certainly, the very general contentions that are included in the petition do not indicate that the petitioners possess the resources or expertise to make that contribution required to permit discretionary intervention. Accordingly, intervention as a matter of discretion should be denied.

II.

CEE'S PETITION FOR LEAVE TO INTERVENE FAILS TO SATISFY THE REQUIREMENTS FOR INTERVENTION EITHER AS OF RIGHT OR DISCRETION AND SHOULD THEREFORE BE DENIED.

A. Intervention as a Matter of Right

The § 2.714 prerequisites to intervention apply with equal force to an organization seeking to intervene on behalf of its members. In such a case, the interests of the individual members must be identified, and, in addition, must be shown to be placed in jeopardy by the outcome of the proceeding. Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420, 422-23 (1976). Additionally, the individual members whose interests are in question must be identified. Omaha Public Power District (Fort Calhoun Station, Unit No. 1), CLI-72-24, 5 AEC 9 (1972); Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-322, 3 NRC 328 (1976); Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Units 1 and 2), ALAB-136, 6 AEC 487 (1973). Lastly, a showing must be made by those individuals that the organization is, in fact, properly authorized to represent them. Barnwell, supra.

Applicants submit that the application of each of these requirements is especially appropriate in this

proceeding lest a hearing be commenced, when one otherwise would not be required, simply "to vindicate [CEE's] value preferences." Sierra Club v. Morton, 405 U.S. 727, 740 (1972), quoted in Barnwell, supra at 422. As set forth below, CEE's petition fails to meet these requirements and should be rejected.

Specifically, the alleged "economic" and "property" interests of CEE's members are generalized and diffuse. CEE has neither "particularized" any of these interests alleged to be possessed by its members nor provided any "concrete demonstration" of how these as yet unpleaded specific interests would be affected by the results of this proceeding. See Nuclear Engineering Co. Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 741, 743 (1978).

CEE has also failed to identify its specific members whose interests CEE is now seeking to represent. CEE has similarly failed to provide any indication whatsoever that the individual members of CEE do, indeed, desire that organization to represent them. In this connection, although a recent Licensing Board allowed this latter requirement to be waived in a particular instance where there appeared to be a delegation of representational authority from the organization to individual members, Wisconsin Public Service Corp. (Kewaunee Nuclear Power

Plant), LBP-78-24, 8 NRC 78, 85 (1978) we, unlike the Staff (Answer at 6), view this as an unsupported departure from the Appeal Board's requirement of individual authorization established in Barnwell. In any event, Dr. Asperger's request to Mr. Hiller to provide, in essence, legal drafting services, as set forth in the affidavit of Eugene B. Thomas, Jr. accompanying Applicant's Motion to Commence Discovery, falls far short of even that authorization permitted in Kewaunee.

B. Intervention as a Matter of Discretion

As set forth above, Applicants submit that the key to whether discretionary intervention should be awarded is whether CEE has demonstrated the ability to make a valuable contribution to the record in this proceeding. Black Fox, supra. Moreover, this ability cannot be presumed. Thus, discretionary intervention cannot be granted just because it does not appear that CEE will not be able to make such a contribution. Rather, "the burden will be on [CEE] to satisfy the Licensing Board on these points." Sheffield, supra at 745. In addition to specifying those issues on which it plans to participate, CEE "must specify the extent to which it will involve itself on those issues and the contribution which that involvement can reasonably be anticipated to make." Id. Simply put, Applicants agree with the Staff that CEE has failed to put forward sufficient

information warranting the award of intervention pursuant to an exercise of this Board's discretion.

Conclusion

For the foregoing reasons, Applicants request that the intervention petitions of Martha and Dan Drake be denied and that the intervention petition of CEE be denied.

Respectfully submitted,

LeBOEUF, LAMB, LEIBY & MacRAE

By Eugene B. Thomas, Jr. / PKO
Partner

1757 N Street, N.W.
Washington, D.C. 20036
(202) 457-7500

Attorneys for Applicants

Of Counsel:

HARRY H. VOIGT
PATRICK K. O'HARE

PETER A. MARQUARDT
2000 Second Avenue
Detroit, Michigan

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UNITED STATES OF AMERICA
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CERTIFICATE OF SERVICE

I hereby certify that I have this 22nd day of November, 1978, served copies of "Applicants' Consolidated Answer to Intervention Petitions of Martha and Dan Drake and Citizens for Employment and Energy" by mailing copies thereof, first-class mail, postage prepaid, and properly addressed, or by personal delivery, as so indicated, to the following persons:

Charles Bechhoefer, Esq.
Chairman, Atomic Safety and
Licensing Board
U.S. Nuclear Regulatory
Commission
Washington, D. C. 20555
(personal delivery)

Dr. David R. Schink
Department of Oceanography
Texas A & M University
College Station, Texas 77840
(mail)

Mr. Frederick J. Shon
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory
Commission
Washington, D. C. 20555
(personal delivery)

Chairman, Atomic Safety
and Licensing Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D. C. 20555
(personal delivery)

Henry J. McGurren, Esq.
Office of the Executive
Legal Director
U.S. Nuclear Regulatory
Commission
Washington, D. C. 20555
(mail)

Stuart A. Treby, Esq.
Office of the Executive Legal
Director
U.S. Nuclear Regulatory
Commission
Washington, D. C. 20555
(mail)

Richard Black, Esq.
Office of the Executive
Legal Director
U.S. Nuclear Regulatory
Commission
Washington, D. C. 20555
(mail)

Mrs. Martha G. Drake
230 Fairview
Petoskey, Michigan 49770
(mail)

Mr. Dan Drake
1912 Geddes Avenue
Ann Arbor, Michigan 48104
(mail)

Mr. Delbert J. Hoffman
Supervisor, Frenchtown
Township
Frenchtown Township Hall
2665 Vivian Road
Monroe, Michigan 48161
(mail)

Chairman, Atomic Safety and
Licensing Appeal Panel
U.S. Nuclear Regulatory
Commission
Washington, D. C. 20555
(personal delivery)

Dr. Robert G. Asperger
12 Dennis Court
Midland, Michigan 48640
(mail)

Monroe County Library System
Reference Department
3700 South Custer Road
Monroe, Michigan 48161
(mail)

Secretary
U.S. Nuclear Regulatory
Commission
Washington, D. C. 20555
Attn: Docketing and Service
Section (orig. plus 20)
(personal delivery)

Eugene B. Thomas, Jr. / pro
Eugene B. Thomas, Jr.

LeBOEUF, LAMB, LEIBY & MacRAE
Attorneys for Applicants