

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY
AND LICENSING BOARD

In the Matter of)
)
WASHINGTON PUBLIC POWER)
SUPPLY SYSTEM) Docket No. 50-508-OL
)
(WPPSS Nuclear Project No. 3))

APPLICANT'S ANSWER IN OPPOSITION
TO REQUEST FOR HEARING AND
PETITION FOR LEAVE TO INTERVENE

I. INTRODUCTION

On September 15, 1982 Notice was published in the Federal Register that the Nuclear Regulatory Commission ("NRC") had received an application from the Washington Public Power Supply System ("Applicant") for a license to operate the Supply System's Nuclear Project No. 3 ("WNP-3"). The Notice provided that requests for a hearing and petitions for leave to intervene may be filed by any person whose interest may be affected by the proceeding. The deadline for filing such requests was October 15, 1982.¹

On February 22, 1983 the Coalition for Safe Power ("petitioner") filed a "Request for Hearing and Petition for Leave to Intervene" ("petition"). It recited its purported interest and the alleged effect the proposed operation of WNP-3 would have on that interest.

¹ 47 Fed. Reg. 40736 (1982).

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Petitioner also announced its intent to file contentions on approximately twenty-one issues which include broad health and safety issues involving Applicant's ability to operate WNP-3. Petitioner conceded that its petition was untimely, although it argued that it satisfied the five-factor test governing late-filed intervention petitions set forth at 10 C.F.R. §2.714(a)(1). Petitioner thereupon concluded that its request for a hearing and petition to intervene should be granted.

II. ARGUMENT

Applicant opposes the petition to intervene and urges that it be denied. However, before presenting legal argument, Applicant wishes to urge this Atomic Safety and Licensing Board ("Board") in ruling on the petition to intervene to be mindful of the admonition of the Appeal Board in Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Power Station).² The Appeal Board observed in Zimmer that "[i]n an operating license proceeding, unlike a construction permit proceeding, a hearing is not mandatory," and cautioned that "a board should take equal care in [OL] cases to assure itself that potential intervenors do have a real stake [i.e., interest] in the proceeding."³

² ALAB-305, 3 NRC 8 (1976).

³ Id. at 12. Accord, Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-183, 7 AEC 222, 226 n. 10 (1974).

Applicant submits that such admonition is especially pertinent in a situation such as this, where the Petitioner is the only person or organization seeking a hearing and where that single hearing request was tendered over four months out of time.

As discussed below, Applicant believes that petitioner has failed to establish a clear legal interest upon which standing in the proceeding can be conferred, as required by 10 C.F.R. §2.714. It has also raised a number of interests which it alleges will be affected by the outcome of this proceeding but which in fact do not satisfy the requirements of Section 2.714. Nor has petitioner demonstrated that, upon a balancing of the five factors set forth in Section 2.714(a)(1), it is entitled to intervention in this proceeding. Lastly, discretionary intervention is unwarranted in this case. Accordingly, the petition should be denied and this proceeding dismissed.

A. Petitioner Has Failed to Establish a Clear Legal Interest in this Proceeding.

The Commission's decision in Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2),⁴ and subsequent decisions of the Atomic Safety and Licensing Appeal Board⁵ clearly establish that a petitioner for intervention of right must assert an "interest which may be affected" by the proceeding. Applying contemporaneous judicial concepts of standing,⁶ the Commission in Pebble Springs interpreted this "interest" requirement as mandating the allegation of facts which support findings of both (1) some injury in fact which has occurred or will probably result from the action involved, and (2) an interest "arguably within the zone of interests" to be protected or regulated by the statute sought to be invoked.⁷

⁴ CLI-76-27, 4 NRC 610 (1976).

⁵ E.g., Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit No. 2), ALAB-470, 7 NRC 473, 475-76 (1978) (Petitioner lacked standing because economic concerns are beyond "zone of interests" of Atomic Energy Act or National Environmental Policy Act); Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1420-23 (1977) (same); Public Service of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-397, 5 NRC 1143, 1147 (1977) (same).

⁶ E.g., Warth v. Seldin, 422 U.S. 490 (1975); Sierra Club v. Morton, 405 U.S. 727 (1972); Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970).

⁷ Pebble Springs, supra, CLI-76-27, 4 NRC at 613-14.

An organization wishing to intervene in an operating license proceeding as the representative of its members must meet one of two threshold showings. First, it must establish that at least one of its members has standing on his own right.⁸ The specific members must be identified,⁹ how their interests may be affected must be shown,¹⁰ and the members' authorization to the organization to intervene must be established.¹¹ Following this mandate, the cases are clear that the individual member from whom

⁸ Edlow International Company (Agent for the Government of India on Application to Export Special Nuclear Material), CLI-76-6, 3 NRC 563, 574-78 (1976) (organization asserting interests of members to establish standing failed to show how interests were such to afford members standing); see also Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 40 (1976), and Warth v. Seldin, supra, 422 U.S. at 511.

⁹ Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 NRC 73, 77 (1979) (organization demonstrating standing on the basis of its members' interests must identify specifically the name and address of at least one affected member who wishes to be represented by the organization).

¹⁰ Edlow International Company, supra, CLI-76-6, 3 NRC at 574-78; Allied General Nuclear Services, et al. (Barnwell Fuel Receiving and Storage Station), LBP-76-12, 3 NRC 277, 281-87 (1976) (where organization claimed to be protecting members' civil rights and property, "interests" cited to establish standing were speculative and thus petition to intervene was denied).

¹¹ Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 395-97 (1979) ("[w]here an organization's standing hinges upon its being the representative of a member" who has standing in his own right, authorization of member permitting organization to represent his interests is required unless authorization may be presumed from membership).

organizational standing is derived must, in some manner (e.g., affidavit), state his concerns and interest in detail sufficient to establish individual standing.¹² Thus, the question of petitioner's standing must be resolved on the demonstration of interest by the individuals whom the petitioner asserts are its members.¹³

Alternatively, an organizational petitioner may demonstrate standing based on the implicit authorization of its members to represent their interests in an NRC proceeding.¹⁴ However, to demonstrate standing in this manner, the organizational petitioner must show that there is a "necessary link between . . . membership and possessing an interest which might be affected by the construction or operation"¹⁵ of WNP-3; i.e., that petitioner was organized

¹² Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-536, 9 NRC 402, 404 (1979) (standing not established when petitioner organization failed to particularize how the interests of a member might be adversely affected by outcome of proceeding); Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), LBP-82-4, 15 NRC 199, 205 (1982) ("when an organization claims that its standing is based on the interests of its members, the organization must identify specific individual members whose interest might be affected . . ., describe how the interests of each of those members might be affected and show that each of those members has authorized the organization to act on his behalf").

¹³ Sierra Club v. Morton, supra, 405 U.S. at 740 ("a party seeking review must allege facts showing that he is himself . . . affected . . .").

¹⁴ Allens Creek, supra, ALAB-535, 9 NRC at 395-97.

¹⁵ Id. at 392.

to oppose nuclear power in general or WNP-3 in particular and that its member upon whom representational standing is purportedly based in fact has an interest affected by the outcome of this proceeding cognizable under Section 2.714.

Petitioner has failed to demonstrate standing to participate in this proceeding. First, petitioner has failed to show that any member living within the vicinity of WNP-3 formally authorized the filing of the petition to intervene on his behalf. It is well established that the submittal of an affidavit by such member is sufficient to show the formal authorization of an organization to represent that person's interests in an NRC proceeding.¹⁶ However, in the instant case there is no direct evidence of formal authorization, only the affidavit of petitioner's director stating the name and address of an individual alleged to be a member of petitioner and asserting that such member has "formally" authorized petitioner to represent his interests in this proceeding. Absent an affidavit from the individual on whom representational standing is based, it is impossible for the Board, Applicant and Staff to verify for themselves whether the contents of the petition are correct.¹⁷ Accordingly, in the absence of sufficient information to allow such

¹⁶ Enrico Fermi, supra, LBP-79-1, 9 NRC at 77-78.

¹⁷ See, Allens Creek, supra, ALAB-535, 9 NRC at 393.

independent verification, petitioner has failed to establish representational standing based on the formal authorization of its member.

Nor has petitioner demonstrated that this member implicitly authorized it to represent his interests in these proceedings by the "mere fact of his membership"18 As noted above, for membership to implicitly constitute an authorization for petitioner to represent its members' interest in this proceeding, petitioner must document that it is a single-issue organization (anti-nuclear or anti-WNP-3), that an individual with legal interest cognizable under 10 C.F.R. §2.714 is a member of the organization, and that the individual possesses an interest which might be affected by the construction and operation of WNP-3.19 Petitioner has failed to do so here. No basis exists in the record for concluding that petitioner is engaged solely or even primarily in opposing nuclear power plants. Nor is it clear that those joining the organization grant petitioner unbridled discretion to represent their interests in NRC proceedings whenever and wherever petitioner sees fit. At bottom, while petitioner may have participated in other NRC proceedings, it is impossible to verify independently that such activity or other activity

18 Petition at 2.

19 See, Allens Creek, supra, ALAB-535, 9 NRC at 392-93.

reflecting an opposition to nuclear power is the only activity in which petitioner engages and that when an individual joins petitioner he is implicitly authorizing petitioner to represent his interests only in NRC proceedings. Accordingly, the record does not support a finding that membership in petitioner carries with it presumptive authorization to represent members' interests in NRC proceedings.

Petitioner also seeks to establish representational standing based on its members who reside "throughout Oregon and Washington."²⁰ Clearly, an allegation that the petitioner has members living throughout Oregon and Washington does not in itself confer standing on that organization. Such a broad area is not within the geographical zone which might be affected by operation of WNP-3. It is also beyond the distance recognized by the NRC in the past to be sufficiently close to vest an interest (if otherwise well pled) in the proceeding.²¹ As to these members, "prima facie, there would appear to be no reasonable chance of [their] being at all adversely

²⁰ Petition at 2.

²¹ E.g., Portland General Electric Co. (Trojan Nuclear Plant), ALAB-496, 8 NRC 308, 309 (1978) (40 miles); River Bend, supra, ALAB-183, 7 AEC at 223 (25 miles); Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-146, 6 AEC 631, 632-34 (1973) (16 air miles); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 190 (1973) (30-40 miles).

affected by either normal operation or a credible accident."²² Accordingly, petitioner is not vested with standing on the basis of members generally alleged to be living throughout Washington and Oregon.

Petitioner also seeks to establish standing by alleging that its members live, work, recreate and travel near WNP-3 and eat foodstuffs grown and produced in the vicinity potentially impacted upon by the operation of the project. Again, this claim is insufficient to establish standing. Recreational activities in an area may provide the legal interest needed to confer standing only if the area is in close proximity to a plant site and the recreational activities are stated with specificity and are substantial in nature.²³ Evaluating the petition to intervene against this guidance, it is clear that petitioner has failed to demonstrate substantial recreational use of the area around the site.

²² River Bend, supra, ALAB-183, 7 AEC at 226.

²³ Compare petitioner's pleading with Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 425 (1973) (in view of all representations made by potential intervenor concerning recreational uses of area in proximity to plant, sufficient interest was shown to establish standing).

Petitioner's other general assertion in this regard is that its members consume food grown or produced in areas that would be affected by plant operations.²⁴ This allegation is too speculative and lacking in specificity to establish legal interest to support the petition to intervene. To confer standing on a petitioner residing outside the relevant geographical zone based on an assertion that some food consumed by the petitioner (or its members) may have been grown near the site would emasculate judicial concepts of standing as well as the interest requirements of the Atomic Energy Act and the Commission's Rules of Practice. The logical extension of such a proposition would be that an individual living in Washington state who consumed Florida grapefruit could be awarded standing in a proceeding relating to a nuclear facility in Florida. Certainly Congress did not intend and has not sanctioned such an interpretation of the Atomic Energy Act, and the Commission and the courts certainly have not judicially construed the Act in such manner.

At bottom, petitioner has utterly failed to establish a clear interest in this proceeding. On the one hand it alleges a legal interest in the proceeding by virtue of its members. But, contrary to well established law, it has not provided the basic information necessary for the

²⁴ Petition at 2.

Board, Staff and Applicant to independently verify whether representational standing is present. Moreover, in many instances it has invoked interests which as a matter of law are insufficient to demonstrate standing to intervene in this proceeding. Consequently, petitioner's "Request for a Hearing and Leave to Intervene" should be denied.

B. Petitioner Has Failed to Establish How Its Purported Interest May be Affected by the Outcome of this Proceeding

Section 2.714(a)(2) requires that the petitioner seeking intervenor status sets forth how its interest may be affected by the outcome of the proceeding in which petitioner wishes to intervene. In the case of an organization seeking standing through one of its members, the organization must show how the interest of that member will be affected by the outcome of the proceeding.²⁵ Because petitioner has failed to satisfy this requirement, its request to intervene should be denied.

It is clear that Section 189 of the Atomic Energy Act "does not confer the automatic right of intervention upon anyone."²⁶ It is also clear that mere proximity of residence to a power reactor alone is not sufficient to confer

²⁵ Allens Creek, supra, ALAB-535, 9 NRC at 393; Maine Yankee, supra, LBP-82-4, 15 NRC at 205; Accord, North Anna Nuclear Power Station, supra, ALAB-536, 9 NRC at 404.

²⁶ BPI v. Atomic Energy Commission, 502 F.2d 424, 428 (D.C. Cir. 1974).

standing. The petition must also explicitly identify "the nature of the invasion of [their] personal interest which might flow from the proposed licensing action."²⁷ Petitioner has failed to do so.

Petitioner asserts that several adverse economic conditions may result if WNP-3 is licensed to operate and that they will affect the interests of its members. First, petitioner claims that "[i]nsurance would not adequately cover losses sustained by the members of the Coalition in case of an accident."²⁸ This apparently is a challenge to the limitation of liability provisions of the Price-Anderson Act, 42 U.S.C. §2210, and the Commission's regulations implementing that Act, and certainly does not establish how any interest might be affected by the proceeding.

In Florida Power & Light Co. (Turkey Point Unit Nos. 3 and 4),²⁹ the Commission held that a licensing proceeding is not the proper forum for an attack on the Price-Anderson Act. Further, a challenge to the Commission's Price-Anderson regulations is proscribed in NRC adjudicatory proceedings by 10 C.F.R. §2.785. Moreover, on June 26, 1978, the Supreme Court in Duke Power Co. v.

²⁷ Allens Creek, supra, ALAB-535, 9 NRC at 393.

²⁸ Petition at 3.

²⁹ Memorandum and Order, 4 AEC 787, 788 (1971).

CESG³⁰ affirmed the constitutionality and reasonableness of that Act. Thus, petitioner's challenge is unsupported and invalid as a matter of law, and can lend no support to its attempt to demonstrate "interest" in this proceeding.

Second, petitioner asserts that "the proposed operation of WNP-3 will place an excessive burden on [p]etitioner's members who are electrical ratepayers."³¹ However, it is well established that the economic interest of a ratepayer is not sufficient to allow standing to intervene before the NRC since concern about rates is not within the scope of interests sought to be protected by the Atomic Energy Act. The cases are legion.³² Nor is such interest within the zone of interests protected by the National Environmental Policy Act.³³ Thus, at bottom these economic claims do not provide any basis for concluding that petitioner may participate in this proceeding.

³⁰ 438 U.S. 59 (1978).

³¹ Petition at 3.

³² E.g., Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-424, 6 NRC 122, 128 n. 7 (1977); Watts Bar Nuclear Plant, *supra*, ALAB-413, 5 NRC at 1420-21 (1977); Detroit Edison Co. (Greenwood Energy Center, Units 2 and 3), ALAB-376, 5 NRC 426, 428 (1977); Public Service Co. of Oklahoma (Black Fox, Units 1 and 2), LBP-77-17, 5 NRC 657, 659 (1977), aff'd in part and rev'd in part, ALAB-379, 5 NRC 1143 (1977).

³³ Pebble Springs, *supra*, CLI-76-27, 4 NRC at 614 (1976).

In addition to these economic interests, petitioner claims that "[r]ecreation may be jeopardized by the project's impact upon the water and aquatic life of the Chehalis River and the surrounding environment."³⁴

Clearly, such unparticularized claim of affected interest is insufficient to demonstrate standing. Petitioner fails to disclose, for example, where such recreation occurs and who of petitioner's members engages in such activity. All the petition alleges is that petitioner's members recreate in "the environs of WNP-3" and that "[r]ecreation may be jeopardized."³⁵ Such vague allegations do not constitute an "interest affected" within the meaning of 10 C.F.R. §2.714 and as such do not provide a sufficient basis upon which to base a finding of standing.

Lastly, petitioner asserts that its interests are affected by this proceeding because operation of WNP-3 "may endanger the health and safety of [P]etitioner's members. . . ."³⁶ A generalized concern regarding the health and safety of petitioner's members is not an "interest affected" within the meaning of Section 2.714. As the Appeal Board stated:

To be sure, persons who live in close proximity to a reactor site are presumed to have a cognizable interest in

³⁴ Petition at 3.

³⁵ Id. at 2-3.

³⁶ Id. at 2.

licensing proceedings involving that reactor. Virginia Electric & Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (January 26, 1979). But there is no like presumption that every individual so situated will deem himself potentially aggrieved by the outcome of the proceeding (an essential ingredient of standing). Some may and some may not. Because of this consideration, the petitioner organization in North Anna did not and could not content itself with the simple assertion that it had members living in the shadow of the facility there in question. To establish its representational standing, it additionally supplied the statement of one of those members, which explicitly identified the nature of the invasion of her personal interest which might flow from the proposed licensing action.³⁷

When viewed against the teaching of Allens Creek, supra, it is clear that petitioner has failed to allege with requisite specificity any public health and safety interest which would be affected by the outcome of this proceeding. Although petitioner may allegedly have a member living within a twenty-five mile radius of WNP-3, there is no indication that such member believes his health and safety may be jeopardized by the operation of WNP-3. All petitioner claims is that the health and safety of its members (whoever they may be and wherever they may live) may be affected by the outcome of this

³⁷ Allens Creek, supra, ALAB-535, 9 NRC at 393, (emphasis added).

proceeding. Such claim is insufficient to demonstrate how an interest within the meaning of Section 2.714 will be affected by the outcome of this proceeding.

C. On Balance, the Factors Governing
Late-Filed Intervention Weigh Heavily
Against a Grant of Intervention

Petitioner concedes from the outset that its petition to intervene is over four months late.³⁸ As a result, petitioner must "affirmatively demonstrate that on balance, [the five factors specified in 10 C.F.R. §2.714(a)(1)] favor his tardy admission to the proceeding."³⁹ Applicant submits that petitioner has failed to sustain this burden and that consequently its petition should be denied.

1. Good Cause. The first element of the five-factor balancing test is whether petitioner has shown "[g]ood cause, if any, for failure to file on time."⁴⁰ The good cause factor is an especially weighty factor in considering whether to grant a late petition to intervene and request for hearing.⁴¹ Importantly, "where no good excuse

³⁸ Petition at 1.

³⁹ Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350, 352 (1980).

⁴⁰ 10 C.F.R. §2.714(a)(1)(i).

⁴¹ Puget Sound Power & Light Company (Skagit/Hanford Nuclear Power Project, Units 1 and 2), ALAB-552, 10 NRC 1, 5 (1979) (citing Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-431, 6 NRC (footnote continued)

is tendered for the tardiness, the petitioner's demonstration on the other factors must be particularly strong."⁴² Manifestly, the rationalization offered by petitioner in support of its actions is insufficient to establish good cause.

Before addressing the myriad of specific excuses offered by petitioner to justify its failure to meet the October 15, 1982 filing deadline, one undisputed fact is clear:

Following discovery of [its] error, Petitioner then waited approximately another two months to file this petition because news reports had indicated that the WNP-3 project was going to be terminated due to financial problems. Expecting imminent cancellation of the project, Petitioner waited to file because certain arguments [sic] on standing, contentions etc. would have been different.⁴³

Petitioner thus concedes that it intentionally delayed filing its petition for two months even though it was aware that it had an obligation to respond seasonably to the Notice of Opportunity published by the Commission. It adopted this course, fully aware of the consequences,

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460 (1977)); and Maine Yankee, supra, LBP-82-4, 15 NRC at 201 (good cause for the filing delay is most important in considering whether to grant a late intervention petition).

⁴² Perkins, supra, ALAB-431, 6 NRC at 462.

⁴³ Petition at 6.

apparently on the strength of erroneous and unidentified "news reports" and for no better purpose than to further some undisclosed litigation strategy involving "standing, contentions etc."⁴⁴

Beyond its conscious decision not to act, petitioner's efforts to explain away its failure originally to meet the October 15, 1983 filing deadline does not establish good cause. First, petitioner claims that shelving procedures at the Multnamah County library somehow were responsible for its alleged failure to receive adequate notice and that, in addition, petitioner was engaged in filing contentions in another licensing proceeding and as such was "otherwise occupied."⁴⁵

Neither rationalization excuses petitioner's failure to file its petition in a timely manner. The Federal Register Act provides that "[a] notice of hearing or of opportunity to be heard, required or authorized to be given by an Act of Congress . . . shall be deemed to have been given to all persons residing within the States of the Union . . . when the notice is published in the Federal Register . . ."⁴⁶ The caselaw at NRC is fully in

⁴⁴ Id.

⁴⁵ Id. at 5.

⁴⁶ 44 U.S.C. §1508; see also, Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384-85 (1947) (publication in Federal Register gives legal notice to all citizens).

accord with this provision.⁴⁷ Therefore, petitioner's failure to see the Federal Register notice of this proceeding manifestly does not constitute good cause.

Similarly, the fact that petitioner may have been preoccupied with another licensing proceeding is not a valid excuse for its failure to satisfy the October 15, 1982 deadline. If an organization decides to participate in a number of simultaneous licensing proceedings, its obligation to meet the NRC Rules of Practice and related requirements in each of those proceedings certainly is not somehow lessened by virtue of its participation in other proceedings. Therefore, petitioner's preoccupation with another licensing proceeding does not excuse its failure to satisfy the October 15, 1982 deadline.⁴⁸

⁴⁷ Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-292, 2 NRC 631, 647 (1975); Consolidated Edison Company (Indian Point Station, Units No. 2), LBP-82-1, 15 NRC 37, 40 (1982).

⁴⁸ Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317 (1980), is instructive in this regard. In that proceeding, intervenor requested relief related to the conduct of discovery. In denying such relief, the Appeal Board observed that much of the intervenor's difficulties (i.e., its failure to answer interrogatories in a timely basis) stemmed from its decision to participate in four simultaneous NRC evidentiary proceedings. The Appeal Board stated as follows:

Obviously, interrogatories designed to discover what (if any) evidence underlies an intervenor's own contentions are not out of

(footnote continued)

Petitioner next asserts that it relied to its detriment on two other means to learn of the October 15, 1982 filing deadline. First, petitioner claims that it expected a Notice of Opportunity for Hearing to be published in the Portland, Oregon newspaper.⁴⁹ However, we know of no statutory or regulatory requirement for NRC to publish a notice of opportunity for hearing in newspapers published in a city (Portland) hundreds of miles from the plant site. In short, petitioner had no reason to assume that the NRC would publish a Notice of Opportunity for Hearing in the Portland paper.

Second, the petitioner claims to have relied upon a Mr. Duree (an attorney living near the site) to notify it of the October 15, 1982 filing deadline and that he did

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order. The record before us indicates that the Coalition's failure to answer them is not principally attributable to a lack of resources. Rather, its refusal to respond stemmed in larger measure from its erroneous ideas about an intervenor's role and obligations in NRC proceedings -- and the fact that its representatives took on far more cases than they could reasonably handle." Id. at 340.

Applicant submits that just as in Susquehanna, where preoccupation with other proceedings did not there excuse the intervenors from satisfying the otherwise applicable Rules of Practice, so in this case petitioner's preoccupation with another proceeding should not excuse its failure to meet the October 15, 1982 filing deadline.

⁴⁹ Petition at 5.

not do so.⁵⁰ However, petitioner does not show how Mr. Duree's failure to notify petitioner of the filing deadline constitutes good cause. Petitioner states that Mr. Duree lives within a twenty-five mile radius from the site (in Aberdeen, Washington). If so, he should have seen local notices of this proceeding which were published in the Tacoma News Tribune, The Daily Olympian, and The Daily World, the latter of which is published in Aberdeen. Moreover, Mr. Duree clearly has no good cause for his failure to see or at least learn of the Federal Register notice of this proceeding.⁵¹ At bottom, petitioner chose to rely on Mr. Duree to advise it of the filing deadline. That reliance proved to be misplaced.⁵² Especially in

⁵⁰ Id.

⁵¹ Washington Public Power Supply System (WPPSS Nuclear Project No. 2), LBP-79-7, 9 NRC 330, 337 (1979).

⁵² Petitioner characterizes Mr. Duree as "a member of the Coalition and well known opponent of WNP-3" and goes on to state that he had advised petitioner that "he received notices of importance that related to WNP-3 from the NRC due to his prior involvement in the construction permit phase" (Petition at 5). It is difficult to understand the thrust of petitioner's assertions in this regard. A review of Mr. Duree's role during the WNP-3 construction permit proceeding does not reveal any evidence that he was a party to that proceeding or that he was on any NRC service list pertaining to WNP-3. To the contrary, during the construction permit hearing for WNP-3, Mr. Duree represented an organization known as Citizens for a Safe Environment which attempted to participate in that proceeding. Because the petition filed by that Group was untimely, it was denied. Washington Public Power Supply System (WPPSS) Nuclear Project Nos. 3 and
(footnote continued)

view of the fact that it is Mr. Duree's interest which petitioner seeks to represent, his failure to advise petitioner of the October 15, 1982 deadline clearly does not warrant good cause to file an untimely intervention.⁵³

Lastly, petitioner attempts to focus attention away from its failure to establish good cause by suggesting that, given the present stage of WNP-3 construction, a public hearing would not delay plant licensing and that in any event such a hearing would be in the public interest. Whether a hearing at this time would delay the licensing process is simply not relevant to whether petitioner demonstrated good cause for its untimely filing. Nor has petitioner set forth any factual underpinning for its assertions that such a public hearing would not ultimately

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5), LBP-77-25, 5 NRC 964, 969 (1977). Mr. Duree also filed a document on behalf of that Group requesting the Appeal Board to consider a number of questions regarding the WNP-3 and WNP-5 construction permits. His request was dismissed for lack of jurisdiction. Washington Public Power Supply (WPPSS Nuclear Projects Nos. 3 and 5), ALAB-501, 8 NRC 381, 382 (1978). Accordingly, Mr. Duree's activities in connection with the WNP-3 construction permit proceeding hardly provided ample basis for petitioner to rely upon him to notify it of when to file its intervention petition.

- 53 Because petitioner seeks to establish representational standing based on Mr. Duree, it was required to set forth in its petition why Mr. Duree also had good cause in failing to satisfy the October 15, 1982 deadline. See WNP-2, supra, LBP-79-7, 9 NRC at 336-37. Petitioner has not done so. On these grounds alone, the petition should be rejected.

delay plant licensing. Lastly, as discussed below in connection with factor two, the public interest can be protected adequately without granting this untimely petitioner an adjudicatory hearing. At bottom, petitioner has failed to demonstrate good cause for failing to file its intervention petition four months out of time and two months after it became aware it missed the October 15, 1982 filing deadline. Accordingly, this factor weighs most heavily against intervention.

2. Other Means to Protect Interests. Petitioner asserts that no other means are available to protect its interests because "commenting on the SER and the DEIS or entering a limited appearance are insufficient," because the NRC Staff does not adequately represent its interests and because there are no state proceedings in which it can protect its interests.⁵⁴ First, these conclusory assertions, without more particularization and substantiation, do not provide any basis upon which to conclude that this factor weighs in favor of petition. No specific factual basis has been given to justify a finding that the NRC Staff will be unable to protect the public interest insofar as health and safety questions are concerned -- as it is statutorily mandated to do.⁵⁵ In addition, to the

⁵⁴ Petition at 7.

⁵⁵ See, Texas Utilities Generating Company, et al.
(footnote continued)

extent petitioner's interest in this proceeding is economic, such interest is not protected by the Atomic Energy Act or the National Environmental Policy Act, and does not warrant participation in an operating license hearing.⁵⁶

At bottom, petitioner's conclusory assertions, without more particularization and substantiation, do not provide any basis upon which to conclude that this factor weighs in favor of petitioner. If, as petitioner claims, there is in fact a significant impediment to protecting its interests through informal consultation with the Staff, formal petitions to the NRC pursuant to 10 C.F.R. §2.206, or comments pursuant to 10 C.F.R. §51.25, it has failed to disclose them on the record. Because the burden was on petitioner to do so,⁵⁷ this failure is fatal to its argument. Accordingly, this factor weighs against the admission of petitioner to this proceeding.⁵⁸

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(Comanche Peak Steam Electric Station, Units 1 and 2),
ALAB-714, 16 NRC __ (Feb. 24, 1983 slip op. at 29.)

⁵⁶ See notes 28-33, supra, and accompanying text.

⁵⁷ Perkins Nuclear Station, supra, ALAB-615, 12 NRC at 352.

⁵⁸ In any event, the Appeal Board has stated that this factor and the extent to which other parties will represent the alleged interest of petitioner should be accorded less weight than the other factors in Section 2.714(a). South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981). In fact, the Appeal Board stated, it is "most difficult to envisage a situation in which

(footnote continued)

3. Contribution to the Record. Petitioner suggests first that the Board need not consider this factor because "it appears to contemplate intervention into an ongoing proceeding."⁵⁹ This suggestion is patently wrong. In a number of NRC proceedings, both the Appeal Board and Licensing Boards have regularly considered this factor.⁶⁰

Moreover, the Appeal Board has stated that when a petitioner addresses this factor "it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony." The Board added that "[v]ague assertions regarding petitioner's ability or resources . . . are insufficient."⁶¹

(footnote continued from previous page)

[these two factors] might serve to justify granting intervention" to one who fails to make an affirmative showing on the other three factors. Id.

⁵⁹ Petition at 7.

⁶⁰ See, Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC ____ (Dec. 8, 1982, slip op. at 9-10), Indian Point Station, supra LBP-82-1, 15 NRC at 41; South Carolina Electric & Gas Company, et al. (Virgil C. Summer Nuclear Station, Unit 1), LBP-78-6, 7 NRC 209, 212 (1978); Florida Power & Light Co. (Turkey Point Nuclear Generating Station, Units 3 and 4), LBP-79-21, 10 NRC 183, 193-94, 211-12 (1979).

⁶¹ Grand Gulf, supra, ALAB-704, Dec. 8, 1982, slip op. at 10.

Because petitioner has provided only vague assertions, this factor weighs against late intervention. Notwithstanding its participation elsewhere, petitioner's activities in this proceeding hardly suggest that it will contribute significantly to the record. A general assertion that it is "working with other intervenors" to identify "expert" witnesses in such areas as radiation, health-physics, engineering and nuclear safety⁶² indicates only that petitioner may be in contact with other anti-nuclear groups. It does not indicate who its prospective witnesses may be or how petitioner will contribute meaningfully to the technical evaluations surrounding issuance of the WNP-3 operating license.

Nor has petitioner identified with the specificity required by the Appeal Board any issues which it seeks to have litigated in this proceeding. To the contrary, petitioner raises the broadest concerns possible, such as whether "[o]peration of the project will not endanger the public health and safety" or whether "[o]peration of the project will be in accordance with the NRC rules and regulations."⁶³ In short, petitioner has failed to demonstrate affirmatively that it has special expertise which

⁶² Petition at 8.

⁶³ Petition at 3-4. The remaining nineteen areas of concern raised by the petitioner are barely more specific.

would aid in the development of a sound record or that it will otherwise contribute meaningfully to the development of such a record in this proceeding.⁶⁴ Accordingly, factor three weighs against intervention.

4. Representation by Other Parties. The holding of the Licensing Board in Indian Point, supra, is instructive in evaluating this factor:

The third of the remaining four factors, the extent to which Petitioners' interest will be represented by existing parties, weighs in Petitioners' favor only to the extent that, if Petitioners' request is denied, there will be no proceeding and hence no parties. However, as the staff points out, it has a duty to see to it that the public interest in the enforcement of the Atomic Energy Act's requirements is met. In the circumstances of an unjustifiably late request which does not indicate what benefits to the public will result from its allowance, we believe it appropriate to assume that the Petitioners' interest will be adequately represented by the Staff. Consequently, we do not weigh this factor in Petitioners' favor.⁶⁵

Petitioner has provided no basis for concluding that the Staff will not assure the Atomic Energy Act is fully satisfied. Accordingly, this factor weighs against intervention.

⁶⁴ See, Virgil C. Summer Nuclear Station, supra, ALAB-642, 13 NRC at 892-93.

⁶⁵ Indian Point, supra, LBP-82-1, 15 NRC at 41; see Comanche Peak, supra, ALAB-714, Feb. 24, 1983, slip op. at 29.

5. Delay of Proceeding. The last factor to be considered is the extent to which late intervention will broaden the issues or delay the proceedings. Again petitioner asserts that the Board need not consider this factor.⁶⁶ However, both the Appeal Board and other Licensing Boards faced with untimely intervention petitions which, if denied, would have obviated public hearings have generally considered this factor.⁶⁷

Clearly the admission of petitioner will delay the proceeding. As the Board in Indian Point, supra, stated:

The last of the remaining factors, whether Petitioners' participation would broaden the issues or delay the proceeding, weighs against Petitioners. Clearly their participation will do both. Absent some showing that a public benefit will accrue from their participation, it must be assumed that starting a proceeding at this late date will have the effects of, at a minimum, inconveniencing the Applicant and diverting Commission resources from other tasks. Thus this factor weighs against Petitioners.⁶⁸

In this case, as well, the admission of petitioner and the related hearing that would be triggered would require the Applicant and Staff to divert resources away from other

⁶⁶ Petition at 8.

⁶⁷ E.g., Grand Gulf, supra, ALAB-704, Dec. 8, 1983, slip op. at 9-10; Indian Point Station, supra, LBP-82-1, 15 NRC at 41; Turkey Point Nuclear Generating Station, supra, LBP-79-21, 10 NRC at 195; Virgil C. Summer Nuclear Station, supra, LBP-78-6, 7 NRC at 213-14.

⁶⁸ Indian Point, supra, LBP-82-1, 15 NRC at 41.

tasks. Accordingly, this factor and the other four factors all weigh heavily against granting petitioner's untimely request to intervene.

One last point is worth noting. There is no justification for granting the petitioner leave to amend its late-filed petition to correct perceived defects in it. While it is a common practice for Licensing Boards to allow a petitioner that has filed a timely request to amend to cure defects on standing, the Board should not allow such amendment here. Petitioner had the opportunity to seek timely intervention and it failed to avail itself of this opportunity. It also had the opportunity to cut short its lateness, but even then did not act promptly. Then, when it finally decided to file a petition, its petition fell short of demonstrating why late intervention should be granted. In these circumstances, fundamental fairness militates against allowing petitioner still further opportunity to satisfy the Commission's requirements governing intervention.

D. Petitioner Should Not Be Granted
Discretionary Intervention

Petitioner attempts to establish standing to intervene, but beyond addressing the factors governing late-filed petitions, does not request discretionary intervention. Nevertheless, the Board may consider whether, as a matter of discretion, petitioner should be admitted as a party.⁶⁹ The standards governing discretionary intervention in large measure parallel the factors governing late intervention.⁷⁰ Therefore, just as petitioner has failed to demonstrate affirmatively that a balancing of such factors warrants late intervention, so it has provided no basis for this Board to grant discretionary intervention.⁷¹ Nor has petitioner set forth any reason why application of the other standards governing discretionary intervention warrant its participation here. Indeed, petitioner has failed even to address those factors. Accordingly, the Board should not grant petitioner discretionary intervention.

⁶⁹ Pebble Springs, supra, CLI-76-27, 4 NRC 614-17.

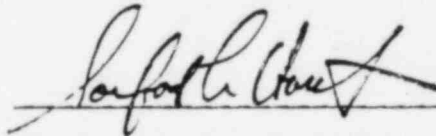
⁷⁰ Id. at 616.

⁷¹ See this Response at 17-30.

III. CONCLUSION

In light of the foregoing, Applicant urges the Board to deny the untimely intervention request. Petitioner has failed to establish standing to participate in this proceeding. Further, a balancing of the five-factor test clearly weighs against granting the untimely petition. Moreover, a granting of discretionary intervention is unwarranted. Accordingly, the petition should be denied and these proceedings dismissed.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Nicholas S. Reynolds", is written over a horizontal line.

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March 9, 1983

Counsel for Applicant

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
WASHINGTON PUBLIC POWER) Docket No. 50-508-OL
SUPPLY SYSTEM)
)
(WPPSS Nuclear Project No. 3))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicant's Answer in Opposition to Request for Hearing and Petition for Leave to Intervene" in the captioned matter were served upon the following persons by deposit in the United States mail, first class, postage prepaid this 9th day of March, 1983:

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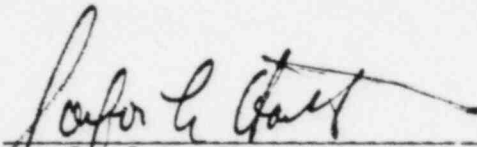
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