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March 29, 1979

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
	)	
VIRGINIA ELECTRIC AND POWER COMPANY	)	Doc. Nos. 50-338 OL
	)	50-339 OL
	)	
	)	
(North Anna Nuclear Power Station, Units 1 and 2)	)	

VEPCO'S ANSWER IN OPPOSITION
TO UCS PETITION TO INTERVENE

In ALAB-529 the Appeal Board ordered an additional evidentiary hearing, limited to the issues of service water pump house settlement and turbine missiles. ALAB-529 was handed down on February 28, 1979, and on March 14 the Union of Concerned Scientists (UCS) petitioned for leave to intervene (or, in the alternative, to participate as amicus curiae). The applicant, Virginia Electric and Power Company (Vepco), opposes the UCS petition for a number of reasons. The most fundamental of these is that UCS is several years late; indeed it has taken the extraordinary step of attempting to intervene at the

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appellate stage, during the Appeal Board's sua sponte review. A second reason is that UCS would lack standing to intervene even if its petition were timely. We will discuss these points in more detail below.

I. Intervening at the Appellate Stage

The first reason why UCS's petition should be denied is that the Commission's Rules of Practice simply do not provide for the introduction of new parties at the appellate stage of a proceeding. UCS seeks to intervene years late, after the ASLB has rendered its decision, after the time for filing exceptions has expired, and after the Appeal Board is well into its sua sponte review. In such circumstances Vepco doubts that 10 CFR § 2.714, on which UCS bases its petition, authorizes intervention even if the petitioner can meet its requirements.

The regulations do provide for participation of newcomers at the appellate stage; 10 CFR § 2.715(d), unlike § 2.714, applies by its terms to matters taken up by the Appeal Board sua sponte. But all that § 2.715(d) permits is the filing of a brief amicus curiae. Section 2.714, on the other hand, says that nontimely filings will not be entertained absent a determination by "the Commission, the presiding officer or the atomic safety and licensing board." The Appeal Board is not mentioned.

In short, we believe there is no authority for allowing intervention at this stage of the proceeding. And even if there were, even if § 2.714 applied, UCS would not have the requisite standing.

II. Standing to Intervene

UCS's claim to standing is that it has members living within 40 miles of the North Anna Station:

> UCS has many donor members residing within 40 miles of the North Anna site, including Mildred Marshall, Reginald Marshall and Roger Hillas, Jr., all of Charlottesville, Virginia.

Union of Concerned Scientists Petition to Intervene or in the Alternative, to Participate as Amicus Curiae 3 (Mar. 14, 1979)(hereinafter simply "Petition"). It is true, of course, that an organization may intervene in an NRC licensing proceeding to represent the interests of its members who themselves have standing, Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420, 422-23 (1976); Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-322, 3 NRC 328, 330 (1976); Public Service Electric & Gas Co. (Salem Nuclear Generating Station, Units 1 & 2), ALAB-136, 6 AEC 487, 489 (1973); Duquesne Light Co. (Beaver Valley Power Station, Unit No. 1), ALAB-109, 6 AEC 243, 244 n.2 (1973).

We suggest, however, that UCS's use of the term "donor members" indicates that the only connection between UCS and the individuals on whom it seeks to base its standing is the contribution of funds. If so, then we believe that Judge Sirica's March 13 decision in Health Research Group v. Kennedy, No. 77-0734 (D.D.C., Mar. 13, 1979), is fatal to UCS's claim to standing in this proceeding. Judge Sirica held that a public interest organization (one of those under the umbrella of Ralph Nader's Public Citizen, Inc.) lacked standing to intervene on behalf of its contributors and supporters, because the contributors lacked "indicia of membership" and any other sufficiently substantial connection with the organization:

> In the Court's view, there is a material difference of both degree and substance between the control exercised by masses of contributors tending to give more or less money to an organization depending on its responsiveness to their interests, or through the expression of opinion in the letters of supporters, on the one hand, and the control exercised by members of an organization as they regularly elect their governing body, on the other.

Health Research Group v. Kennedy, printed in Legal Times of Washington, Mar. 19, 1979, at 19, 3d col.

Even if the donor members are true members under Judge Sirica's test, UCS does not say that they support the UCS intervention, or even that they are aware of this proceeding at all. Nor has UCS produced affidavits or other written

verification that the UCS members in the vicinity of North Anna have authorized it to represent them in this proceeding. See Order Concerning Discovery, Contentions and Scheduling, Duke Power Co. (Amendment to Materials License SNM-1773 for Oconee Nuclear Station Spent Fuel Transportation and Storage at McGuire Nuclear Station), Doc. No. 70-2623, at 1 n.1 (February 23, 1979) (unpublished); Memorandum and Order, Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), Doc. No. 50-382, at 4 (Mar. 7, 1979) (unpublished); Order Ruling Upon Intervention Petitions, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), Doc. No. 50-466, at 19, 47, 52 (Feb. 9, 1979) (unpublished). The most recent Appeal Board pronouncement on this issue, so far as we know, is in ALAB-528:

> The applicant challenges this conclusion, maintaining that Davidson [a student organization] was required to demonstrate that its membership had voted to seek intervention on the matter raised by the submitted contention and had authorized the chairperson to represent the organization. We disagree. In our view, it was enough for standing purposes that the petition had been signed by a ranking official of the organization who himself had the requisite personal interest to support an intervention petition. The applicant cites no prior case in which either we or a licensing board has demanded more in such circumstances, and we know of none. . . .
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> [T]he Licensing Board may wish to make further inquiry to insure that, in fact, the new representative has been duly authorized to act upon Davidson's behalf.

Duke Power Co. (Amendment to Materials License SNM-1773 - Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC ___ (Feb. 26, 1979) (slip op. 9-11). Vepco believes that the mere statement of counsel that UCS has certain "donor members" in Charlottesville is inadequate.

Apart from the interest of certain of its members, to which UCS devotes only the single sentence quoted above,[1] UCS refers obliquely to a number of organizational interests -- its interest in a "range of issues pertinent to nuclear power" (Petition at 2) and its interest in avoiding a bad precedent (id. 4). Originally, of course, it asserted the interest[2] of preventing prejudice to its petition to shut down all operating reactors, in part because their licenses were based, UCS alleged, on the probabilities in the Rasmussen report, WASH-1400 (see UCS's Motion to File a Brief Amicus Curiae, Oct.

1/On pages 3-4 of its petition UCS says that at first "nothing in particular appeared to distinguish the North Anna case from a number of other operating license proceedings." This suggests to Vepco either that the UCS members in Charlottesville have moved there recently or that their interests aren't really at the heart of UCS's desire to intervene.

2/The amicus curiae section of the NRC regulations, 10 CFR § 2.715(d), requires the amicus to state his "interest." See 10 CFR § 2.715(d), 43 Fed. Reg. 17798, 17802 (Apr. 26, 1978).

16, 1978, at 2-3).

Such "interests" as these, of course, are inadequate to confer standing. The desire to prevent adverse precedent does not confer standing in NRC proceedings. Consolidated Edison Co. of New York (Indian Point, Units 1, 2 & 3), ALAB-304, 3 NRC 1, 4, 5 (Jan. 6, 1976). Nor does a "mere interest" in an issue. Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station), LBP-75-60, 2 NRC 687 (1975), aff'd, ALAB-328, 3 NRC 420 (Apr. 28, 1976); Nuclear Engineering Co., Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 742 (May 3, 1978); see also Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-77-11, 5 NRC 481, 484 (1977). In short, UCS's attempts to establish that it has standing are inadequate.

III. Untimeliness

Even if UCS had standing, its petition would still fall for untimeliness. Assuming that 10 CFR § 2.714 applies in this situation, a tardy petitioner must justify his intervention on the basis of the five factors in § 2.714. Let us look at each of them in turn.

The extent to which the petitioner's interest will be represented by existing parties

The extent to which UCS's interest will be represented by others is a factor that weighs against UCS's intervention. UCS recognizes that Intervenor Arnold already claims the interest of people who live near the power plant but says that she lacks the "resources" of UCS.

However, the Commonwealth of Virginia has announced that it will participate in the hearing. We presume UCS would accept the Commonwealth's ability and commitment to represent the interests of her citizens, as well as the sufficiency of her "resources." Moreover, we believe the Appeal Board itself can be counted on to look after the public health and safety in conducting the hearing.[3] We have here, in fact, a situation similar to that in the Shearon Harris case, and a passage from an Appeal Board decision in that case bears quoting:

> That consideration [that the would-be intervenors had not shown they could contribute to the development of the record] is determinative here, particularly given the high potential for delay which would attend upon petitioners' belated intervention* and the presence of other intervenors -- including the Attorney General of North Carolina -- who apparently propose to participate in the upcoming hearing.**

3/ We leave aside the NRC Staff, which we also believe represents the interests of health and safety.

*We stress that the remanded issue is not a newly discovered one. Thus, the petitioners cannot point to it as recent development justifying their belatedness. Moreover, even viewed in terms of the timing of the remand order, the petition was not filed promptly.

**The Licensing Board noted in its January 10 order (at p.5) that it also intended to participate actively in the development of the record on the management capability issue. As CLI-78-18 reflects, the Commission remand of that issue was prompted by an expression of concern on the part of that Board.

Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant. Units 1-4), ALAB-526, 9 NRC ___ (Feb. 13, 1979).

The availability of other means whereby the petitioner's interest will be protected

One means by which UCS could protect its interest would be by making another limited appearance. It is true that in ALAB-528 the Appeal Board found this insufficient, stressing the value of the participational rights enjoyed by parties, including presenting evidence and cross-examining. Duke Power Co. (Amendment to Materials License SNM-1773 -- Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC ___ (Feb. 26, 1979) (slip. op. 6-7). The difference between that case and this one, however, is that here UCS has been satisfied with limited appearances and amicus briefs until now. If it regarded the right to cross-examine witnesses and present evidence as so

important, one wonders why it didn't claim those rights at the time of Mr. Pollard's limited appearance back in 1977.

Also, we think it is fair to ask the Appeal Board to look not only at UCS's petition to intervene, but also at its amicus briefs and supporting motion to ascertain what interests it seeks to protect. UCS's original reason for wanting to participate at this appellate stage, one must remember, was to challenge the alleged reliance on the Rasmussen report, WASH-1400, and to prevent prejudice to its "Petition for Emergency and Remedial Action" to the Commission. See UCS Motion to File a Brief Amicus Curiae, Oct. 16, 1978, at 2-3. The means for protecting that interest, of course, is that separate proceeding itself.

The extent to which the petitioner's participation will broaden the issues or delay the proceeding

We acknowledge that UCS's commitment not to delay the proceeding weighs in its favor (even though UCS in the next breath asks for 10 days for discovery). Nevertheless, the best intentions in the world may not be sufficient to prevent delay when a new party intervenes, and we think it fair to consider in the balance that UCS participated by limited appearance back in May 1977, that Mr. Pollard sent a number of letters to the ASLB attempting to raise additional doubts at inconvenient times,[4] that UCS filed first an amicus brief and then a second

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4/ Letter of Sept. 26, 1977, from Mr. Pollard to the ASLB;

brief with an entirely different approach, and that only in February 1979 did UCS finally decide to try and intervene, raising for the first time the interests of donor members in the vicinity of the powerplant. This is not, we suggest, the record of one who can be counted on not to cause delay. Moreover, the mere fact that a late petition will not cause additional delay does not by itself satisfy the test for permitting late intervention. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760, 798 (Nov. 23, 1977).[5]

The extent to which petitioner's participation may reasonably be expected to assist in developing a sound record

It is true that UCS has one technical witness, Mr. Pollard, and its counsel are experienced in NRC matters. On the other hand, there is little reason to believe UCS can shed

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letter of Feb. 16, 1978 from Mr. Pollard to the ASLB; see Notice to the Parties, Feb. 1, 1978, with attached letter of January 13, 1978, from Mr. Pollard. In the February 16, 1978, letter cited above Mr. Pollard apparently tried to convince the ASLB to delay the North Anna proceeding on the mere chance that his Freedom of Information Act request to the NRC might turn up something relevant.

5/ It is true that if the petition to intervene is extremely late, the delay factor is very important. The Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-476, 7 NRC 759, 761-62 (May 11, 1978).

much light on the issues in this particular proceeding. Its real interest appears to be in the generic issues, and the UCS documents filed thus far show little familiarity with the North Anna Station or the documents relating to it. See Order Subsequent to the Prehearing Conference on January 25, 1979, Washington Public Power Supply System (WPPSS Nuclear Project No. 2), Doc. No. 50-397 OL, at 16 (Mar. 6, 1979) (unpublished). Also, UCS does not specify what "evidence" it proposes to offer (Petition at 2) or what "resources" it can bring to bear on the issues (id. 6), unless it simply means Mr. Pollard's expertise.

Moreover, UCS's claim that without its participation the record would have been silent of critical comment is without merit. This proceeding involves an operating license application; only contested issues are litigated in such proceedings, and so of course the record is silent on other issues. As always, however, the NRC Staff reviewed the turbine missile issue and pronounced the plant acceptable.

These four factors, then, do not weigh heavily in UCS's favor. It follows that UCS is not entitled to intervene, because a "particularly strong" showing on these four factors is needed when no "good cause" is shown for the petitioner's lateness. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-420, 6 NRC 8, 22 (July 12, 1977); Nuclear

Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (Apr. 17, 1975); 43 Fed. Reg. 17799, 3d col. (Apr. 26, 1978). As we shall now see, UCS has failed to make such a showing.

Good cause

UCS has shown no "good cause" at all, as it is candid enough to more or less admit (see Petition at 6). Its representative Robert Pollard made a limited appearance in this proceeding, during which he discussed the turbine missile issue, on May 31, 1977. Mr. Pollard has written a number of letters to the Licensing Board since then, indicating that he has been following the progress of the proceeding. Against this background it would be miraculous if UCS were able to establish "good cause."

USC's argument that it did not exist as a membership organization at the time when petitions to intervene were due cannot be taken seriously. The Appeal Board addressed the point in Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-526, 9 NRC _____ (Feb. 13, 1979) (slip op. 3-4):

> It may well be that, as has been asserted, Mr. Eddleman has not long resided in the general vicinity of the Shearon Harris Facility and that the Alliance is of recent origin. We agree with the Licensing Board, however, that this explan-

> ation for the tardy filing cannot carry the day. If newly acquired standing (or organizational existence) were sufficient of itself to justify permitting belated intervention, the necessary consequence would be that the parties to the proceeding would never be determined with certainty until the final curtain fell. Assuredly, no adjudicatory process could be conducted in an orderly and expeditious manner if subjected to such a handicap.

UCS also claims changed circumstances. It argues (1) that only recently has the Appeal Board (in ALAB-444 and ALAB-491) made it possible to raise generic issues in individual licensing proceedings and (2) that by elevating turbine missiles to the level of a contested issue in this proceeding the Appeal Board (in ALAB-529) has ensured that a precedent (which may prove adverse to UCS's position) will be established. Neither reason has merit.

Just what it was that alerted UCS that it is possible to litigate generic issues is not entirely clear from the UCS petition. Apparently it was the River Bend case, decided in 1977, or ALAB-491, decided August 25, 1978. See UCS Petition at 4. In either case there is no excuse for waiting until March 1979 to intervene.[6]

6/ Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79, 85 (July 15, 1974), says only that generic environmental issues that are, or are about to be, the subject of a rulemaking may not be considered in individual licensing proceedings.

In any event, even if we accept that River Bend somehow changed the ground rules and that UCS could not reasonably have been expected to litigate its generic concerns until someone else (the parties to the River Bend case) had established its right to do so, UCS still fails to show good cause. The contention it raises now is plant-specific: "that the North Anna safety systems are not adequately protected from turbine missiles" (Petition at 3). Can there be any doubt that UCS could have raised this issue earlier than 1979? The Staff's Safety Evaluation Report addressed the turbine missile issue (Staff Ex. 3 at 10-2), Mr. Pollard raised it in his limited appearance, the licensing board apparently considered it,[7] and there was no reason for UCS to suppose that it could not be litigated.

UCS's second point is that the decision in this case will create a precedent that may hurt it in other proceedings. But if the wish to avoid adverse precedent is not an adequate basis for standing in NRC proceedings, Consolidated Edison Co. of New York (Indian Point, Units 1, 2 & 3), ALAB-304, NRCI-76/1 1, 4, 5 (1976), then it certainly shouldn't be a basis for

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7/ See Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 & 2), LBP-77-68, 6 NRC 1127, 1131-32 (Dec. 13, 1977).

showing "good cause." In any event, the findings to be made about turbine missiles in this proceeding, as we have said time and time again, are extremely plant-specific and factual, rather than legal, in nature. It is hard to imagine how a bad "precedent" could hurt UCS.[8]

IV. Discretionary Intervention and Participation as Amicus

Although UCS does not argue that it should be granted discretionary intervention, it does claim that it should be allowed to participate as amicus curiae. What we have already said about the five factors of § 2.714, we suggest, goes also to the issue of allowing UCS to participate as a matter of the Appeal Board's discretion.

Ideally, an amicus curiae should be a disinterested expert that the court asks for help on a complex legal issue. See generally Alexander v. Hall, 64 F.R.D. 152, 155 (D.S.C. 1974). The First Circuit has cautioned that courts should not accept every would-be amicus that steps forward; in Strasser v.

8/ If, as it suggested in its earlier petition to file an amicus brief, UCS thinks the North Anna decision could prejudice the Commission's reconsideration of UCS's "Petition for Emergency and Remedial Action," the answer is simply that the North Anna decision will affect the Commission's decision on UCS's Petition for Reconsideration only insofar as it is persuasive, and UCS is free to argue its unpersuasiveness as much as it wants in its own proceeding.

Doorley, 432 F.2d 567 (1st Cir. 1970), where the publishers and sellers of an underground newspaper had challenged a city ordinance requiring newsboys to be licensed, the court said this:

> We do think that something is to be said for defendants' complaint that the court should not have invited the filing of an amicus brief by a member of the bar who is nationally prominent in the civil liberties field. At a minimum, reply poses a burden on the opposite party, who may, in addition, feel that he is outnumbered. For the court not merely to accept, but to invite an amicus whose point of view is well known may be thought particularly questionable when, as here, it appears that that side of the case is already well represented.
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> We recognize that the acceptance of amicus briefs is within the sound discretion of the court, and that by the nature of things an amicus is not normally impartial. Furthermore, if an amicus causes the district court to make an error of law--an amicus who argues facts should rarely be welcomed--the error can be corrected on appeal. Nonetheless, we believe a district court lacking joint consent of the parties should go slow in accepting, and even slower in inviting, an amicus brief unless, as a party, although short of a right to intervene, the amicus has a special interest that justifies his having a say, or unless the court feels that existing counsel may need supplementing assistance.

432 F.2d at 569 (footnote omitted).[9]

9/ But see General Motors Corp. v. Volpe, 321 F. Supp. 1112, 1116 n.3 (D. Del. 1970), noting that the court had permitted Ralph Nader and others to participate as amici because their "special interest and concern. . .in automotive safety generally and this dispute in particular" had been amply demonstrated.

The above passage suggests a number of reasons why UCS's motion should be denied. First, the matter of relative expertise. UCS seeks to advise the Appeal Board on nuclear powerplant safety -- a far cry from the case of a generalist court that seeks guidance in some specialized field. The Appeal Board already has an expert participant in the NRC Staff. Second, the matter of interest: It is apparently not necessary that an amicus curiae have standing such as an intervenor must have. But 10 CFR § 2.715(d) does require a volunteer amicus to state an "interest." We have already shown, we believe, that UCS's asserted "interest" is wanting.[10] Third, UCS seeks not just to advise on legal issues, but to present evidence, cross-examine, and perhaps appeal an adverse

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10/ But see Consolidated Edison Co. of New York, Inc. (Indian Point, Unit Nos. 1-3), ALAB-304, 3 NRC 1 (Jan. 6, 1976). There thirty applicants in a Massachusetts construction permit proceeding (involving the Montague Station) petitioned for leave to intervene in a special seismic proceeding involving operating reactors in New York. The Montague applicants argued that the resolution of certain "regional" seismic issues in the Indian Point proceeding might affect NRC Staff review of the Montague application.

The Appeal Board refused to allow them to intervene, pointing out that no matter what position the Staff might take in Montague, the applicants were free to convince the Montague ASLB of the merits of their own position, id. 6. The Appeal Board went on to say that if the Montague applicants wished to file an amicus brief after the Indian Point seismic hearing was held, it would "quite likely" grant them leave to do so, id. 7.

decision. As UCS observes, the NRC rules do not provide for such participation, and Strasser v. Doorley, above, seems to disapprove it ("an amicus who argues facts should rarely be welcomed").

V. Conclusion

UCS has sought, at least since Mr. Pollard's limited appearance in 1977, to gain for itself the advantages of participation in this proceeding without the attendant responsibilities. By waiting until the eleventh hour to escalate its level of participation it apparently seeks to gain the right to judicial review without the burden of going through a lengthy administrative proceeding. This is no doubt an efficient means of husbanding UCS's resources, but it should not be allowed as a means of getting around the NRC's Rules of Practice. Vepco urges the Appeal Board to deny the UCS petition.

Respectfully submitted,

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DATED: March 29, 1979

CERTIFICATE OF SERVICE

I hereby certify that I have this day served Vepco's Answer in Opposition to UCS Petition to Intervene upon each of the persons named below:

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