UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

Public Service Electric and Gas Company	)	
	)	Docket No. 50-354-OL
(Hope Creek Generating Station)	)	

APPLICANTS' ANSWER TO "MOTION TO HOLD PUBLIC HEARING AND TO ADMIT PUBLIC ADVOCATE AS A PARTY-INTERVENOR UNDER 42 U.S.C. 2239, IN OPERATING LICENSE PROCEEDINGS"

Preliminary Statement

On August 10, 1983, the Nuclear Regulatory Commission ("Commission" or "NRC") published a notice in the Federal Register entitled "Public Service Electric and Gas Co., and Atlantic City Electric Co., Hope Creek Generating Station; Receipt of Application for Facility Operating License, Availability of Applicant's Environmental Report, and Consideration of Issuance of Facility Operating License and Opportunity for Hearing ("Notice").[1/]

In response to that Notice, a motion (hereinafter "petition") was filed by the Division of Rate Counsel, Department of the Public Advocate of the State of New Jersey ("Public Advocate") for admission to the proceeding pursuant

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1/ 48 Fed. Reg. 36357 (August 10, 1983).

to 10 C.F.R. §§2.714 and 2.715. The Public Advocate also requested a hearing. As discussed below, Public Service Electric and Gas Company, et al. ("Applicants") oppose the Public Advocate's petition. The Public Advocate has failed to demonstrate affirmatively that he possesses the requisite statutory authority to initiate and/or participate in the instant proceeding. In fact, the enabling statute clearly limits his actions to the agencies and courts of New Jersey. Moreover, his petition does not satisfy the rules of the NRC for intervention, specifically, the requirements of a statement of those aspects which concern a petitioner and a showing of a particularized interest sufficient for standing.

Argument

I. The Public Advocate is not Authorized by his Enabling Statute to Participate in This Proceeding

The Public Advocate derives his authority wholly from the Department of the Public Advocate Act of 1974, N.J.S.A. 52:27E-1 et seq. Inasmuch as the Public Advocate is attempting to participate in this proceeding[2/] in his representative capacity, it is incumbent upon the presiding

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2/ As discussed in Part II, infra, it is unclear whether the Public Advocate wishes to participate as an interested State pursuant to 10 C.F.R. §2.715(c) or as an intervenor. Either way, he lacks authority to appear in this proceeding for the reasons discussed herein.

Atomic Safety and Licensing Board ("Licensing Board" or "Board") to determine at the outset, upon challenge, whether the Public Advocate indeed possesses the requisite authorization to function in such a capacity.

Absent such statutory authority to act, the Public Advocate may not represent the citizens of the State of New Jersey any more than any other group representative may represent the interests of its members without lawful authority. See, e.g., Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 395-97 (1979); Houston Lighting and Power Company (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 444 (1979); Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 NRC 73, 77 (1979).

In the Allens Creek decision, the Appeal Board foresaw the possibility that a party might wish to challenge the petition of a group representative as ultra vires action. It stated that "the appropriate and total response would have been a demonstration that a decision to file had been arrived at in a manner consistent with the [group's] internal procedures."[3/] Just as a group may be asked to demonstrate compliance with its internal procedures, so must the Public Advocate affirmatively demonstrate that he is

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3/ Allens Creek, ALAB-535, supra, at 396.

authorized by statute to undertake the representation of the interests alleged in the petition.[4/]

The Public Advocate's petition fails to make the requisite showing that such authority exists. First, the citation to other proceedings in which the Public Advocate has participated has no legal significance whatsoever and is not binding on Applicants herein or this Licensing Board. The cases cited by the Public Advocate simply did not raise, much less decide, the issue of his authority to participate in those proceedings. Such decisions therefore lack res

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4/ The Public Advocate's authority to participate in the instant proceeding for the issuance of an operating license demands special scrutiny since no hearing is mandatory under the Act. Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 582 (1978); Cincinnati Gas & Electric Company (William H. Zimmer Nuclear Power Station), ALAB-305, 3 NRC 8, 9 (1976). Moreover, the Public Advocate's petition is the only one which has been timely filed and a hearing would not otherwise be triggered. Houston Lighting and Power Company (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 651 (1979); Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1422 (1977). As the Appeal Board stressed in South Texas, supra, at 649 "boards should be cautious about triggering such hearings at the behest of those without a statutory right to intervene." While the statute to which the Appeal Board referred was the Atomic Energy Act of 1954, 42 U.S.C. 2011 et seq., its holding has equal relevance and importance with regard to the authority of the Public Advocate under his own statute.

judicata effect or precedental value.[5/] It is therefore necessary to examine the pertinent statutory provisions.

As noted, all authority of the Public Advocate derives from the Department of the Public Advocate Act of 1974 N.J.S.A. 52:27E-1 et seq. The Act establishes within the Department five separate Divisions, each having its own scope of authority and enumerated powers. Each Division therefore functions autonomously, albeit under the general direction of the Public Advocate. In this proceeding, it is the Division of Rate Counsel which has sought to intervene. No explanation is provided as to why the Division of Rate Counsel undertook this matter. As discussed below, the nature of this proceeding is clearly beyond his statutorily delegated jurisdiction.

Before examining the particular sections of the statute cited or omitted by the Public Advocate in defining his specific authority, it is important to keep in mind that the courts of New Jersey have followed the general rule of construction in interpreting a grant of delegated authority by a legislature to an agency:

> Since administrative agencies are purely creatures of legislation without inherent or common-law powers, the general rule applied to statutes

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5/ Howard v. Green, 555 F.2d 178, 182 (8th Cir. 1977); Aldolph Coors v. C.I.R., 519 F.2d 1280, 1283 (10th Cir.), cert. denied, 423 U.S. 1087 (1975). See Allen v. McCurry, 449 U.S. 90, 94 (1980); Federated Department Stores v. Moitie, 452 U.S. 394, 398 (1981).

> granting powers to them is that only those powers are granted which are conferred either expressly or by necessary implication.6/

See, e.g., In re Jamesburg High School Closing, 83 N.J. 540, 416 A.2d 896 (1980). While recognizing that there may be instances where it would be necessary to construe a statute as empowering certain acts beyond those specified in order to permit the fullest accomplishment of what is perceived to be the legislative intent (i.e., to find by means of necessary implication those powers which are incidental and appropriate for reasonable fulfillment), the New Jersey Supreme Court has nevertheless precluded such expansion where there is doubt:

> Administrative discretion is special and limited, contained by the declared legislative policy to be executed by the agency and the specific means provided by the lawmaker to that end. The legislative grant is inclusive of such authority and is by fair implication and intendment incident to the agency's essential function and purpose; and where there is reasonable doubt of the existence of a particular power, the power is denied. All else would be ultra vires. Extrajurisdictional administrative acts are void.7/

The general powers and duties of the Public Advocate are set forth in N.J.S.A. 52:27E-4. The power to initiate

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6/ 3 Sutherland Statutory Construction §65.02 (4th ed. 1974) (footnotes omitted).

7/ Swede v. City of Clifton, 22 N.J. 303, 125 A.2d 865, 869 (1956) (emphasis added).

litigation in connection with specific functions set forth elsewhere in the Act is defined in Section 4 as follows:

> e. Institute or cause to be instituted such legal proceedings or processes consistent with the rules governing the courts of New Jersey and the practice of law therein as may be necessary properly to enforce and give effect to any of his powers or duties . . . . [Emphasis added.]

Obviously, the Notice issued by the Commission affording intervention and an opportunity for a hearing in the instant proceeding is not governed by the rules of the courts of New Jersey or the practice of law therein. The unambiguous intent of the Legislature as expressed in this general provision is that the Public Advocate's participation in legal proceedings shall be limited to the courts and agencies of the State of New Jersey.

None of the provisions cited by the Public Advocate authorizes him to initiate or participate in federal agency proceedings such as this. To the contrary, the statute quite clearly shows that no such participation was contemplated or authorized. The Public Advocate cites N.J.S.A. 52:27E-18 as a specific source of authority for filing the petition. However, it is this section that, in fact, establishes his very lack of authority to appear in federal proceedings. Apparently, the Public Advocate believes that this particular provision is controlling since the petition has been signed and submitted by an attorney from the Division of Rate Counsel. N.J.S.A. 52:27E-18 states:

> The Division of Rate Counsel shall represent and protect the public interest as defined in section 31 of this act in proceedings before and appeals from any State department, commission, authority, council, agency or board charged with the regulation or control of any business, industry or utility regarding a requirement that the business, industry or utility provide a service or regarding the fixing of a rate, toll, fare or charge for a product or service. [Emphasis added; footnote omitted.]

In interpreting this provision, the Board must give fair meaning to the plain language of the statute. The restriction of the Division of Rate Counsel to State proceedings is clear, unequivocal and unambiguous. As is generally recognized:

> One of the most common insights about the process of communication was given classic expression by the Supreme Court of the United States in the declaration that "the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms."8/

In addition to limiting the jurisdiction of the Division of Rate Counsel to State regulatory agencies and appeals therefrom, such jurisdiction is also limited to matters regarding the providing of a service or the fixing

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8/ 2A Sutherland Statutory Construction, §46.01 (4th ed. 1974), citing Caminetti v. United States, 242 U.S. 470 (1917); see also In re Jamesburg High School Closing, supra, 83 N.J. at 547, 416 A.2d at 899-900.

of a rate. The NRC has no statutory authority over such matters, and has consistently excluded attempts by those petitioning for intervention to raise ratemaking issues. It is well established under the Commission's precedents that the concerns expressed in the petition regarding electric power rates are beyond the "zone of interests" protected under the Atomic Energy Act, 42 U.S.C. §2011 et seq., and therefore beyond the scope of NRC licensing proceedings.[9/] Therefore, the NRC has no authority to adjudicate matters within the jurisdiction of the Division of Rate Counsel. Conversely, the Division of Rate Counsel has no statutory authority to litigate the matters asserted in the petition.

An examination of the statute indicates that the only Division with even arguable authority to act in this matter would be the Division of Public Interest Advocacy. Even assuming that a petition were filed by the Division of Public Interest Advocacy, there has still been no showing of any authority under the statute to initiate or intervene in

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9/ Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614 (1976); Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit No. 1), ALAB-582, 11 NRC 239, 243 n.8 (1980); Public Service Company of Oklahoma (Black Fox, Units 1 and 2), LBP-77-17, 5 NRC 657, 659 (1977), aff'd, ALAB-397, 5 NRC 1143, 1147 (1977); Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), Docket No. 50-289 (Restart), "Memorandum and Order Ruling on Petitions and Setting Special Prehearing Conference" (September 21, 1979) (slip op. at 7).

an NRC proceeding.[10/] While the Public Advocate cites N.J.S.A. 52:27E-29 for support, this particular provision contains no such authority. Moreover, by its very terms, this provision strongly suggests that the Division of Public Interest Advocacy operates dichotomously within the Division of Rate Counsel such that together they will represent the "public interest" in all State administrative and court proceedings. N.J.S.A. 52:27E-29 states:

> The Division of Public Interest Advocacy may represent the public interest in such administrative and court proceedings, other than those under the jurisdiction of the Division of Rate Counsel pursuant to Article II herein, as the Public Advocate deems shall best serve the public interest. [Emphasis added; footnote omitted.][11/]

10/ There has certainly been no finding of "public interest" by the Public Advocate pursuant to his regulations under N.J.A.C. 15A:1-1.1 et seq. (copy attached).

11/ The Public Advocate cites N.J.S.A. 52:27E-30, but this provision is merely a statutory definition of what constitutes "public interest" for the purpose of limiting the kinds of cases in which the Public Advocate is authorized to appear. The section says nothing as to the courts, agencies or tribunals before which the Public Advocate may appear. N.J.S.A. 52:27E-30 states:

> As used in this act, public interest shall mean an interest or right arising from the Constitution, decisions of court, common law or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens.

While this section includes "other laws of the United

(Footnote Continued)

In fact, N.J.S.A. 52:27E-29 must be read in pari materia with N.J.S.A. 52:27E-32 (not cited by the Public Advocate), which sets forth the power which the Division of Public Interest Advocacy has to "represent and protect the public interest." The latter section states:

> The Division of Public Interest Advocacy may represent and protect the public interest by:
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> a. Intervening in or instituting proceedings before any department, commission, agency or board of the State leading to an administrative adjudication or administrative rule as defined in section 2 of P.L. 1968, c. 410 (C. 52:14B-2).
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> b. Instituting litigation on behalf of a broad public interest when authorized to do so by the Public Advocate. [Emphasis added.]

Here again, the expression of legislative intent is unmistakable.12/ Thus, the statute clearly limits the authority

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(Footnote Continued)
States" within the definition of the "public interest," one must distinguish between what the Legislature defined as the public interest and, on the other hand, the tribunals before which it authorized the Public Advocate to appear. The Legislature was certainly aware that many federal laws permit suit in state courts to obtain relief. It also understood that federal constitutional rights are enforceable in the courts of New Jersey. See, e.g., Peper v. Princeton University Board of Trustees, 77 N.J. 55, 74, 389 A.2d 465, 474-75 (1978).

12/ Construed in pari materia with subsection (a), subsection (b) and N.J.S.A. 52-27E-4, subsection (b) is properly interpreted as similarly limiting the authority of the Public Advocate to State proceedings. Moreover, subsection (b) cannot be construed to
(Footnote Continued)

and jurisdiction of the Public Advocate to representation of the "public interest" in State proceedings.

Obviously, there are ratemaking proceedings in neighboring states which have a significant impact upon the interests of New Jersey residents who work or own business interests in those jurisdictions or frequently travel there. Yet, the Legislature expressly restricted the Division of Rate Counsel to New Jersey ratemaking proceedings. Nothing asserted by the Public Advocate indicates why the Legislature would have intended the dichotomous arm of the same Department to have greater authority to appear in federal agency proceedings in foreign jurisdictions. N.J.S.A. 52:27E-32 expressly refutes such a construction.

Yet another infirmity in the attempted intervention is the lack of any intradepartmental authorization. N.J.S.A. 52:27E-5 authorizes the appointment of an Assistant Public Advocate to have and exercise the powers and to perform the functions and duties of the Public Advocate during the absence or disability of the Public Advocate. No recognition or announcement has been made by the Department (or any other level of the State Government) that the Public Advocate, Joseph H. Rodriguez, is either absent or disabled,

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(Footnote Continued)
authorize intervention in a federal agency proceeding. If the language "[i]nstituting litigation" were so construed, subsection (a), with its limitation to State agency proceedings, would be rendered meaningless.

precluding his functioning in office. The only other way under Section 5 by which the Public Advocate can perform through the Assistant Public Advocate is by a direction by the Public Advocate which is "in writing, signed by the Public Advocate and filed with the Secretary of State," including "a designation of the period during which it shall be and remain in force." No such authorization and direction has been filed with the Secretary of State.

This case raises an important statutory question of first impression.[13/] Just as each tribunal has the inherent jurisdiction and responsibility to determine its own powers,[14/] this Board must satisfy itself that State officers purporting to exercise their discretion under delegated powers are in fact doing so within the confines of their limited jurisdiction. In this instance, the Public Advocate has clearly exceeded his jurisdiction and the petition should be denied.

13/ The decisional law under the statute relates to the authority of the Public Advocate to intervene in particular kinds of State proceedings. While those cases have found that the Public Advocate has broad discretion in determining when the "public interest" justifies his participation in such State proceedings, they provide no guidance as to basic the jurisdictional question presented here.

14/ Duke Power Company (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-591, 11 NRC 741, 742 (1980).

II. The Public Advocate has Failed to Satisfy the Commission's Requirements for Intervention

Inasmuch as the Public Advocate has requested permission to participate pursuant to both the "interested State" and intervention provisions of the Commission's rules, it is unclear whether the Public Advocate wishes to initiate a proceeding or participate in one if in fact there is a hearing.[15/] It is well established that a request for participation by an interested State under 10 C.F.R. §2.715(c) "does not itself trigger a hearing." Northern States Power Company (Tyrone Energy Park, Unit 1), CLI-80-36, 12 NRC 523, 527 (1980) (views of Chairman Ahearne and Commissioner Hendrie). Thus, a governmental entity such as the Public Advocate cannot initiate a hearing under Section 2.715(c).

In any event, the petition does not satisfy the requirements of 10 C.F.R. §2.714(a)(2) and (d) if, indeed, the Public Advocate is seeking admission as a party. Subsection (a)(2) provides:

> The petition shall set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene, with particular reference to the factors in paragraph (d) of this

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15/ As noted, no other timely petitions requesting intervention and/or a hearing have been filed.

> section, and the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene.

In turn, subsection (d) requires a petitioner to address and the presiding Atomic Safety and Licensing Board ("Licensing Board" or "Board") to consider:

> (1) The nature of the petitioner's right under the Act to be made a party to the proceeding.
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> (2) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.
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> (3) The possible effect of any order which may be entered in the proceeding on the petitioner's interest.

A. Aspects

The Public Advocate has failed to designate "the specific aspect or aspects of the subject matter of the proceeding" for which he seeks intervention. As the Board stated in the Midland proceeding, the requirements for properly designating such "aspects" are unclear but likely "narrower than a general reference to our operating statutes."[16/] Here, the Public Advocate has simply listed a number of catchwords which provides no more than such general references. Using the approach taken by the Public Advocate, a petitioner could list as "aspects" anything

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16/ Consumers Power Company (Midland Plant, Units 1 and 2), LBP-78-27, 8 NRC 275, 278 (1978).

contained in 10 C.F.R. Parts 50 or 51, e.g., Section 50.34 (technical information). Accordingly, the "table of contents" approach utilized by the Public Advocate does not even begin to comply with this requirement. Such an approach, if permitted, would render the requirement of designating "aspects" meaningless.

Moreover, if construed to permit the Public Advocate's approach, the Commission's rule on "aspects" would not satisfy the requirements of the Administrative Procedure Act in 5 U.S.C. §554(b), which states, inter alia: "When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law . . . ." (Emphasis added). The recitation by the Public Advocate gives no such prompt notice and also fails to afford Applicants procedural due process under the Fifth Amendment, which also requires prompt notice with reasonable specificity of the claims raised by a hearing adversary. See, e.g., Doe v. Civil Aeronautics Board, 356, F.2d 699, 701 (10th Cir. 1966).

Further, as the Licensing Board stated in the TMI-1 (Restart) proceeding, any subject matter alleged as an aspect must be "within the scope of the proceeding as set forth in the notice of hearing."[17/] In several respects,

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17/ Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), Docket No. 50-289 (Restart), (Footnote Continued)

the Public Advocate's designation of "aspects" fails to meet even this minimal requirement, e.g., designated "aspects" relating to "[c]onformity to construction permit" and "ATWS events at Salem." Thus, at least several of the items identified by the Public Advocate as "aspects" are not cognizable under the Notice issued by the Commission in the instant proceeding, and the remaining "aspects" are insufficiently specified to satisfy the requirements of the Commission's rules.

B. Standing

Aside from self-serving statements as to his own authority under State statute and participation in previous proceedings, compliance with the provisions on requiring a statement of the petitioner's interests is limited to two extremely conclusionary statements. Paragraphs (3) and (4) of the petition are simply to the effect that the Public Advocate's interests are the health and safety of the citizens of New Jersey and the safety of their property and environment. While such a blanket assertion might be acceptable for a governmental entity seeking admission as an interested State, it clearly fails to meet the requirements of the Commission's rules for persons or entities seeking to intervene as parties. Thus, if a governmental entity elects

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(Footnote Continued)
"Memorandum and Order Ruling on Petitions and Setting Special Prehearing Conference" (September 21, 1979) (slip op. at 6).

to seek participation as a party, it must satisfy the requirements of 10 C.F.R. §2.714 just like any other petitioner. Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-82-19, 15 NRC 601, 617 (1982).

Moreover, the Public Advocate's compliance with these requirements at the operating license stage is particularly consequential in this instance because, if the Public Advocate lacks standing, the petition will be denied and no hearing will be held.[18/]

In prior decisions, the Commission's adjudicatory boards have rejected similarly vague and generalized conclusions as to a petitioner's allegations regarding his interest in the proceeding and the manner in which granting of a license would have upon that interest. As a consequence of failing to particularize his interest in the proceeding as required by the rules, the Public Advocate has also failed to demonstrate his standing.

The decisions of the Commission and its adjudicatory boards do not provide clear guidance as to what would constitute the requisite "personal interest" where a State officer such as the Public Advocate seeks intervention. Specifically, it is uncertain whether the mere proximity of certain residents to a nuclear facility, absent any other nexus or showing, would be sufficient. However, the

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18/ See note 4, supra.

Commission's decisions, which have adopted the test for standing utilized by the Supreme Court in requiring a demonstration of "injury in fact" to establish the requisite personal interest in the matter,[19/] seem to indicate that a further, concrete showing must be made.

Thus, the Commission has indicated that "injury in fact" to the petitioner himself, and not a generalized grievance or interest shared by a large class of the public, is necessary for standing. In Transnuclear, Inc., CLI-77-24, 6 NRC 525 (1977), the Commission held as follows in deciding that petitioners lacked standing to request a hearing:

> Any right the Petitioner may have to demand a hearing in the present proceeding must be based upon Section 189 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2239. That section provides that a hearing must be granted, on the request of persons who can demonstrate an "interest [which] may be affected by the proceeding." Under the most recent Supreme Court decisions on standing, a party seeking relief must "allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction." Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973), Warth v. Seldin, 422 U.S. 490, 499 (1975); see Simon v. Eastern Kentucky Welfare Rights Organization, 426, U.S. 26 (1976). One

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19/ It is well settled that in determining the standing of intervenors in an NRC licensing proceeding, the precedents of the federal courts are to be applied. Edlow International Company (Agent for the Government of India on Application to Export Special Nuclear Material), CLI-76-6, 3 NRC 563, 569-70 (1976).

> focus of the "injury in fact" test is the concept that a claim will not normally be entertained if the "asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens . . . ." Warth v. Seldin, 422 U.S. at 499. Thus, even if there is a generalized asserted harm, the Petitioners must still show a distinct and palpable harm to them. Id. at 501. See United States v. Students Challenging Regulatory Action Procedures (SCRAP), 412 U.S. 669 (1973).20/

The Commission reviewed and reaffirmed these requirements for standing in rejecting intervention petitions in Westinghouse Electric Corp. (Export to South Korea), CLI-80-30, 12 NRC 253 (1980). It again emphasized the importance of stating some "injury in fact" to the petitioner himself as a basis for establishing the requisite personal interest in the proceeding. The Commission held:

> In developing the "injury in fact" requirement, the Court has held that an organization's mere interest in a problem, "no matter how long-standing the interest and no matter how qualified

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20/ 6 NRC at 530-31 (emphasis added). While the cited proceeding was for consideration of export license applications, the Commission did not distinguish the standing requirements from those applications in all proceedings, including reactor applications.

Also interpreting Warth v. Seldin, supra, the Board in Three Mile Island restated the "governing rule . . . that a generalized grievance shared in substantially equal measure by all or a large class of citizens is normally not cognizable as standing to participate." Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), Docket No. 50-289, "Memorandum and Order Ruling on Petitions and Setting Special Prehearing Conference" (September 21, 1979) (slip op. at 7).

> the organization is in evaluating the problem," is not sufficient for standing to obtain judicial review. Sierra Club v. Morton, 405 US 727, 739 (1972). The organization seeking relief must allege that it will suffer some threatened or actual injury resulting from the agency action . Linda R.S. v. Richard D., 410 US 614, 617 (1973); Warth v. Seldin, 422 U.S. 490, 499 (1975). Simon v. Eastern Kentucky Welfare Rights Organization, 426 US 26, 40 (1976), made clear that "an organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury, required by article III."21/

In certain cases, it is easy to discern that the Appeal Board has followed the approach adopted by the Commission in construing Section 2.714 to limit intervention to those who have particularized specific injury and do not merely seek to vindicate the general public interest. In the Sheffield proceeding, the Appeal Board stated these requirements for standing as follows:

> Both the Atomic Energy Act and the Commission's Rules of Practice confer a right to intervene in a licensing proceeding upon those who possess an "interest [which] may be affected by the proceeding." It is now settled that, in

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21/ 12 NRC at 258. Of course, the "injury in fact" requirement for an organization or individual petitioner are identical, since the organization stands in the shoes of the members it purports to represent. Certainly, there is nothing in the regulations to suggest that different rules exist for organizations than for individuals. Therefore, absent a statement by a petitioner as to how he has a "direct stake in the outcome" of the proceeding, his generalized allegations establish only a "mere 'interest in the problem.'" Sierra Club v. Morton, 405 U.S. 727, 739 (1972).

> determining whether such an interest has been satisfactorily alleged, contemporaneous judicial concepts of standing are to be applied. More specifically, it must appear from the petition both (1) that the petitioner will or might be injured in fact by one or more of the possible outcomes of the proceeding, and (2) that the asserted interest of the petitioner in achieving a particular result is at least arguably within the "zone of interests" protected or regulated by the statute or statutes which are being enforced. Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976).
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> As is readily apparent from the foregoing, neither petitioner has identified, let alone particularized, any specific injury that it or its members would or might sustain should the Sheffield license renewal and amendment application be denied or, alternatively, granted subject to the imposition of burdensome conditions upon the license. Rather, both petitioners seek intervention in order to vindicate broad public interests said to be of particular concern to them and their members or "contributors" ([petitioner] does not claim to have members as such).
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> . . . the test is whether a cognizable interest of the petitioner might be adversely affected if the proceeding has one outcome rather than another. And, to repeat, no such interest is to be presumed. There must be a concrete demonstration that harm to the petitioner (or those it represents) will or could flow from a result unfavorable to it - whatever that result might be.22/

22/ Nuclear Engineering Company, Inc., (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), (Footnote Continued)

In Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377 (1979), the Appeal Board stated that valid petitions have "explicitly identified the nature of the invasion of [petitioner's] personal interest which might flow from the proposed licensing action."[23/] And again in South Texas supra, 9 NRC at 646 n. 8, the Appeal Board held that standing required allegations of residence proximate to the facility "coupled with [petitioner's] expressed concern about injury to his person and property should the plant malfunction . . . ."

In the Palisades proceeding, the Licensing Board similarly construed these decisions to mean that "close proximity" to the facility merely raised a presumption of standing and that further demonstration of a "cognizable interest personal" to the intervenor is necessary for standing. The Board said:

> Conceding that those who live within close proximity to a nuclear facility are presumed to have a cognizable interest, the Staff asserts that it is important to recognize that the "close proximity" test only raises a

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(Footnote Continued)
ALAB-473, 7 NRC 737, 739-41, 743 (1978) (emphasis added) (footnotes omitted). While this decision arose under the old version of Section 2.714, the standing requirements under the old and new rules are the same. See also Allied General Nuclear Services (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420 (1976).

23/ 9 NRC at 393 (emphasis added) (footnote omitted).

> presumption of standing. What is really "presumed" the the "close proximity" test is that the potential litigant will in fact be able to show an injury to an interest protected by the Atomic Energy Act. If he or she cannot, then the presumption fails.
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> The Staff position is amply supported by at least two cases [citing and discussing Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 393 (1979); Dairyland Power Cooperative (LaCrosse Boiling Water Reactor), LBP-80-26, 12 NRC 367, 373 (1980)]. . . .
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> Thus, the Union cannot assert standing in this case by virtue of the "close proximity" test unless it can also show that it has an interest protected by the Atomic Energy Act (a "cognizable interest") that has been adversely affected by the Director's Order in a way that is environmentally or safety-related.24/

Accordingly, while decisions of the Commission's adjudicatory boards are lacking in total consistency and clarity, it does appear that the blanket allegations and conclusionary statements submitted by the Public Advocate do not provide either the requisite specificity or concreteness necessary to demonstrate a particularized "personal interest" in the subject matter of this proceeding. As the Board in the Skagit proceeding succinctly stated, "a mere academic

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24/ Consumers Power Company (Palisades Nuclear Power Facility), Docket No. 50-255 SP "Memorandum and Order Ruling on Petition to Intervene," (July 31, 1981) (slip op. at 11-12) emphasis added).

interest in the outcome of the proceedings will not confer standing."[25/] The petition should therefore be denied.

Conclusion

For the reasons more fully discussed above, the Public Advocate has failed to demonstrate affirmatively any grant of authority by the Legislature to initiate or participate in this proceeding. He has also failed to satisfy the requirements of establishing a personal interest in the outcome of the proceeding and designating those aspects in which he has such an interest. Accordingly, the petition to intervene should be denied.

Respectfully submitted,

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September 24, 1983

25/ Puget Sound Power & Light Company (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-26, 15 NRC 742, 743 (1982).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

Public Service Electric and Gas Company	)	
	)	Docket No. 50-354-OL
(Hope Creek Generating Station)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Answer to 'Motion to Hold Public Hearing and to Admit Public Advocate as a Party-Intervenor Under 42 U.S.C. 2239, In Operating License Proceedings,'" dated September 24, 1983 in the captioned matter has been served upon the following by deposit in the United States mail this 24th day of September, 1983:

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