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II. BACKGROUND

On May 21, 1985, the Commission published in the Federal Register a "Notice of Consideration of Issuance of Amendment To Facility Operating License And Proposed No Significant Hazards Consideration Determination And Opportunity For Hearing." 50 Fed. Reg. 20969 (1985). In that Notice, the Commission proposed to determine, inter alia, that the proposed amendment increasing the K-effective limit of the fuel storage pool at the Pilgrim Nuclear Power Station from 0.90 to 0.95 for normal condition would result in a change that is "clearly within all acceptable criteria with respect to the system or component specified in the Standard Review Plan." 50 Fed. Reg. at 20971. The Commission directed that all comments on this proposed determination and any petition for leave to intervene be received within 30 days of the publication of the Notice, or June 21, 1985. 50 Fed. Reg. at 20969. Mr. Doherty's petition was filed on June 29, 1985, eight days after the deadline established by the Commission had passed. In his petition, Mr. Doherty does not even attempt to explain why his untimely petition should be entertained.

III. STANDARDS GOVERNING PETITIONS TO INTERVENE

The Appeal Board has recognized that participation by the public in licensing proceedings serves a valuable purpose. See e.g., Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-243, 8 AEL 850,853 (1974); Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-229, 8 AEC 425 (1974). This does not mean, however, that any member of the public is entitled to intervene in a licensing proceeding. Section 2.714 of the Commission's

Rules of Practice requires that a petition to intervene set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, and the specific aspects of the subject matter of the proceeding for which intervention is sought. 10 C.F.R. § 2.714(a)(2). In addition, a petitioner is required to explain affirmatively why intervention should be permitted. Id. In connection with the latter requirement, the petition should discuss: (i) the nature of the petitioner's right under [Section 189a of the Atomic Energy Act, 42 U.S.C. § 2239(a)] to be made a party to the proceeding; (ii) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (iii) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. See 10 C.F.R. § 2.714(a)(2) and (d).

Finally, it should be noted that the Commission's Rules of Practice provide that petitions to intervene not filed within the time period prescribed in the Notice of Hearing will not be entertained absent a determination that the five factors set forth in 10 C.F.R. § 2.714(a)(1) militate in favor of granting the petition. The factors to be considered are: (i) whether good cause is shown for failure to file on time; (ii) the extent to which the petitioner's interest will be protected; (iii) the extent to which the petitioner's participation reasonably may be expected to assist in developing a second record; (iv) the extent to which petitioner's interest will be represented by existing parties; and (v) the extent to which the petitioner's interest will broaden the issues or delay the proceeding. 10 C.F.R. § 2.714(a)(1).

IV. DISCUSSION

A. The Board Should Not Now Grant The Petition
For Leave To Intervene Because The Standards
Governing Untimely Intervention Have Not Been Met

As noted above, the Commission's Notice of Hearing, which was published in the Federal Register on May 21, 1985, required all comments and petitioners for leave to intervene to be filed within 30 days; in other words, not later than June 21, 1985. See 50 Fed. Reg. at 20969. Mr. Doherty did not file his petition until June 29, 1985, eight days after the deadline established by the Commission had passed. Consequently, the petition is untimely and should not be considered in the absence of a determination that the balance of the equitable factors listed in 10 C.F.R. § 2.714(a)(1) (i-v) "favor [petitioner's] tardy admission into the proceeding." Duke Power Co. (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-615, 12 NRC 350, 352 (1980); see Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975). The burden is on the petitioner to demonstrate that the balance of the equities lies in favor of granting the petition to intervene. See Perkins, supra, 12 NRC at 352.

1. Good Cause

The first factor to be considered in passing upon a late-filed petition is whether good cause has been shown for filing out of time. The Appeal Board has indicated that the more compelling the justification for filing late, the more attenuated the showing may be with respect to the four other factors listed in 10 C.F.R. § 2.714(a). See e.g. Puget Sound Power & Light Co. (Skagit Nuclear Power Project, Units 1 and 2),

ALAB-523, 9 NRC 58, 63 (1979); See also Wisconsin Public Service Corp. (Kewaunee Nuclear Power Plant), LBP-78-24, 8 NRC 78-83 (1978); see also Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-420, 6 NRC 8, 22 (1977), aff'd, CLI-78-12, 7 NRC 939 (1978).

Conversely, where good cause is not shown, the burden of justifying intervention on the basis of the four other factors necessarily is greater. Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273 (1975); Duke Power Co. (Perkins Nuclear Power Station, Units 1, 2, and 3), ALAB-431, 6 NRC 460, 462 (1977).

Additionally, the Appeal Board has made plain that it is permissible to take into consideration the length of delay in assessing the weight to be accorded a petitioner's unexcused failure to file on time. See Washington Public Power Supply System (WPPSS Nuclear Project, No. 3), ALAB-747, 18 NRC 1167, 1173 (1983). In that case, the Appeal Board held that "for the purpose of determining how compelling a showing must be made on the other Section 2.714(a) factors, a [four-month delay is not to] be equated with one extending over a period of years." Id. Where, as here, the delay is substantially less (in this case, eight days), the strength of the showing the petitioner must make with respect to the other Section 2.714(a) factors should be further reduced accordingly.

Neither the Staff nor the Board presently is in a position to determine whether there is sufficient reason to excuse Mr. Doherty's failure to file his petition on time. This is because the petition filed by him does not even attempt to explain why his petition was not filed before the June 21, 1985 deadline set forth in the May 21, 1985 Notice of Hearing. Consequently, Mr. Doherty's failure to proffer any explanation for the

untimely filing of the petition prevents the Board from determining that there exists good cause to excuse his failure to file his petition in a timely fashion. Moreover, Mr. Doherty's failure to tender a good reason for his eight-day filing delay increases "(but not exceptionally so) the showing that [he is] required to make on the other factors." Id. (footnote omitted).

2. Availability of Other Means and Representation by Existing Parties

The second factor to be considered under Section 2.714(a) is whether there are available other means to protect petitioner's interest. This factor weighs in favor of granting the petition because other than participating in the NRC licensing proceeding, there may be no other forum in which Mr. Doherty may pursue his interests. Similarly, regarding the fourth factor (the extent to which petitioner's interest will be represented by existing parties), there is no private other party that will directly represent Mr. Doherty's interest. Nor can the Staff be counted on to advance Mr. Doherty's position since its position and that of Mr. Doherty's with respect to the safety hazards presented by the proposed amendment are at odds with one another. Compare 50 Fed. Reg. at 20971 with Petition at 4.

Consequently, both the second and the fourth factors weigh in Mr. Doherty's favor. It should be noted however, that the Appeal Board has observed that the availability of other means whereby a petitioner can protect its interest and the extent to which other parties will represent that interest in the proceeding properly are accorded relatively less weight than the other three 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, it is "most difficult to envisage a situation in which [these two factors] might serve to justify granting intervention" to one who fails to make an affirmative showing on the other three factors. Id.

3. Development of Sound Record

The third factor, the extent to which petitioner can assist in developing a sound record, also weighs against Mr. Doherty. It is well settled that to make the requisite showing, a petitioner must affirmatively demonstrate that it has special expertise which would aid in the development of a sound record. See Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570, 576 (1980); Virgil C. Summer, supra, 13 NRC at 892-93. As the Appeal Board noted in Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725 (1982), 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." Id. at 1730; WPPSS Nuclear Project, supra, 18 NRC at 1177. Where a petitioner relies upon its prior participation in other licensing proceedings to demonstrate that it can make a contribution to the development of a sound record, it must show a nexus between the issues litigated in the prior proceedings and the issues involved in the proceeding in which intervention is sought. See WPPSS Nuclear Project, supra, 18 NRC at 1177-78; Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 400-401 (1983).

As noted earlier, in his petition, Mr. Doherty makes no effort to discuss any of the factors governing late-filed intervention petitions. Consequently, there is nothing in the petition to indicate whether Mr. Doherty (i) possesses special expertise with respect to the subject matter for which intervention is sought; (ii) has retained qualified experts; or (iii) by virtue of prior involvement in other licensing proceedings can assist in the development of a sound record. Accordingly, Mr. Doherty has failed to meet his burden with regard to this factor. Mr. Doherty's failure in this regard is particularly noteworthy because as the Appeal Board noted in WPPSS Nuclear Project, supra, a petitioner's ability to make a "valuable contribution" to the development of a sound record "assumes greater importances" in cases in which the decision to grant or deny an untimely intervention petition "will also decide whether there is to be any adjudicatory hearing." 18 NRC at 1180.

4. Delay and Broadening of Issues

The final factor to be considered is the extent to which petitioner's participation will broaden the issues or delay the proceeding. Only the delay to the proceeding which can be attributed directly to the tardiness of the petition is to be taken into account in applying this factor. West Valley, CLI-75-4, 1 NRC at 276; Long Island Lighting Co. (Jamesport, Units 1 and 2), ALAB-292, 2 NRC 631, 650 & n.25) (1975). This factor weighs in favor of Mr. Doherty. It must be remembered that Mr. Doherty's petition was filed within eight days of the deadline set forth in the Notice of Hearing. More importantly, the petition was filed nine days before the appointment of the licensing board established to

preside over this proceeding. See 50 Fed. Reg. 28484 (July 12, 1985). In these circumstances, it is difficult to argue that Petitioner "has occasioned a potential for delay in the completion of the proceeding that would not have been present had the filing been timely." WPPSS Nuclear Project, supra, 18 NRC at 1180. (emphasis in original).

In summary, the factors favoring the granting of Mr. Doherty's petition is the lack of another forum to pursue his claim, the lack of another party in this proceeding to protect his interest, and the absence of any delay to the proceeding occasioned by his tardy filing. These factors are offset by Mr. Doherty's failure to tender an explanation for his untimely filing and the absence of a showing that Mr. Doherty possesses the special expertise, resources, or experience necessary to make a positive contribution toward the development of a sound record. Because a petitioner's ability to contribute toward the development of a sound record assumes "greater importance in cases, such as that at bar, in which the grant or denial of the petition will also decide whether there is to be any adjudicatory hearing," WPPSS Nuclear Project, supra, 18 NRC at 1180, the Staff believes that Mr. Doherty's failure to make this showing tips the balance of the equitable factors set forth in 10 C.F.R. § 2.714(a) slightly against granting the petition for leave to intervene.

B. Standards Governing Intervention

In part IV(A), the Staff addressed the consequences of Mr. Doherty's failure to discuss each of the factors listed in 10 C.F.R. § 2.714(a)(1) and to explain why, on balance, they warrant a consideration of his

untimely petition for leave to intervene. In the Staff's view, because Mr. Doherty has made no effort to satisfy the requirements of 10 C.F.R. § 2.714(a)(1), the Board properly may dismiss his petition. Nevertheless, in the following section of this Response, the Staff will address the sufficiency of Mr. Doherty's petition in light of the standards governing timely petitions to intervene.

1. Interest and Standing

Section 189(a) of the Atomic Energy Act provides, inter alia, that in a license amendment proceeding, a hearing shall be granted upon request "of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to the proceeding." 42 U.S.C. § 2239(a). This statutory provision has been given effect by the Commission in Section 2.714 of its Rules of Practice. See 10 C.F.R. § 2.714. To determine whether a petitioner has the requisite "interest" to warrant intervention, the Commission has stated that "contemporaneous judicial concepts of standing should be used." Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614 (1976). Consequently, to establish standing a petitioner must show that (i) he would be injured by the challenged action and (ii) the injury sought to be avoided is within the zone of interests protected by the statutes governing the proceeding. E.g. Pebble Springs, Id., 4 NRC 614-615; Public Service Co. of Indiana (Marble Hill Nuclear Generating Stations, Units 1 and 2), CLI-80-10, 14 NRC 428, 429 (1980). To enable the licensing board to make these determinations, it is incumbent upon a petitioner to set forth with particularity the interest of the petitioner in the

proceeding [and] how that interest may be affected by the results of the proceeding[.]" 10 C.F.R. § 2.714(a)(2).

2. Mr. Doherty's Standing and Interest In The Proceeding

In his petition, Mr. Doherty states that his interest in the proceeding is the preservation of his health and safety, Petition at 3, and bases his standing to intervene in the proceeding on the fact that he "resides 43 miles from Applicants' spent fuel pool, and thus is within the zone of possible radiation exposure in the event of a radioactivity releasing event such as a spent fuel pool loss of water accident or criticality accident." Id. In addition, Mr. Doherty asserts that he consumes food products grown in the vicinity of the Pilgrim Nuclear Station and fish from the Massachusetts Bay (in which Applicants' reactor releases radioactive effluents). Id. Finally, Mr. Doherty relies upon his status as a ratepayer of the Applicant to establish standing.

In the Staff's view, Mr. Doherty's petition recites the facts necessary to support a finding that he has standing to intervene in this proceeding. First, the petition alleges that in the event the amendment authorizing Applicant to increase the K-effective limit of the fuel storage pool at the Pilgrim Nuclear Power Station from 0.90 to 0.95 is approved, the petitioner will be injured in his health or safety by the increased possibility of a radioactivity releasing accident. This allegation satisfies the "injury-in-fact" prong of the standing test. As the Commission has observed, this requirement is met where a petitioner asserts a "cognizable interest" that "might be adversely affected if the

proceeding has one outcome rather than another." Public Service Co. of Indiana (Marble Hill Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 428, 429 (1980); Nuclear Engineering Co., Inc. (Sheffield, Illinois Low-Level Radiological Waste Disposal Site), ALAB-743, 7 NRC 737, 743 (1978). The injury which Petitioner seeks to avoid is also within the zone of interests which this proceeding is intended to protect. See Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98, 105 (1976) ("zone-of-interest" test satisfied where interest alleged is the "avoidance of a threat to health and safety as a result of radiological releases from the nuclear facility (either in normal operation or as the result of an accident)).

Additionally, the Staff notes that Petitioner alleges that he resides 43 miles from Applicant's facility. Petition at 1. The case law suggests a geographical proximity of this distance from a nuclear power reactor is, in itself, sufficient to establish standing. See e.g. Virginia Electric and Power Co. (North Anna Nuclear Power Station,) (Units 1 and 2), ALAB-522, 9 NRC 54, 56-57 (1979) (45 miles); Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 n.4 (1977) (50 miles); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-24, 14 NRC 175, 178-179 (1981) (50 miles). For all of these reasons, the Staff agrees that Mr. Doherty's petition recites the

facts necessary to support a determination that he has standing to intervene in this proceeding. ^{1/}

3. "Specific Aspect" Requirement

In addition to demonstrating a cognizable interest in the proceeding, Section 2.714(a)(2) requires a petitioner to identify the specific aspects of the subject matter of the proceeding as to which intervention is sought. 10 C.F.R. § 2.714(a)(2). This does not mean, however, that the petition must set forth an admissible contention. On the contrary, an "aspect", as that term is used in Section 2.714(a)(2), generally is understood to be broader than a contention. See Consumers Power Co. (Midland Plants, Units 1 and 2), LBP-78-27, 8 NRC 275, 278 (1978). It has been held that the "specific aspect" requirement is

^{1/} The Staff agrees with Applicant that the fact that Petitioner is a ratepayer of Boston Edison Company and consumes food products produced in the vicinity of the Pilgrim Nuclear Power Station is insufficient to confer standing to intervene in the proceeding. See Licensee's Answer to John F. Doherty's Request For A Hearing And Petition For Leave To Intervene at 5-6 (July 12, 1985). It is well settled that, for purposes of establishing standing, a petitioner must allege an injury separate from that which would be sustained by members of the general public. See, e.g., Warth v. Sedlin, 422 U.S. 490, 499 (1975); Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1420 (1977). For this reason, the economic interest of a ratepayer is not sufficient to confer standing. See, e.g., Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-424, 6 NRC 122, 128 (1977); Watts Bar Nuclear Plant, supra, 5 NRC at 1420. Similarly, the injury alleged by Petitioner to result from the consumption of food products produced in the vicinity of the Pilgrim Nuclear Power Station is not distinct from the "generalized grievance shared in substantially equal measure by all or a large class of citizens." Watts Bar Nuclear Plant, supra, 5 NRC at 1420, quoting Warth v. Sedlin, supra, 422 U.S. at 490.

satisfied where (i) the petitioner identifies its general position on the matters with respect to which intervention is sought and (ii) those matters are within the scope of the proceeding. Id.; see Metropolitan Edison Co. (Three Mile Island, Unit 1), unpublished Memorandum and Order, slip op. at 6 (September 21, 1979); Philadelphia Electric Co. (Limerick Station, Units 1 and 2), unpublished Memorandum and Order, slip. op. at 13-14 (October 14, 1981).

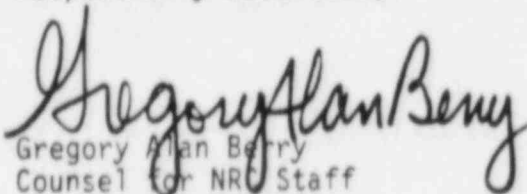
In the Staff's view, Petitioner has satisfied the "specific aspect" requirement. Petitioner seeks intervention to challenge the proposed amendment to Applicant's operating license. In particular, Petitioner states that intervention is sought "to show that operation of the spent fuel pool at $K\text{-eff}=0.95$ under normal conditions is hazardous, involving a significant reduction in an extremely important margin of safety." Petition at 4. Petitioner states his general position on the matter succinctly: "[T]he reduction of safety margin from $K\text{-eff}=0.90$ to $K\text{-eff}=0.95$ increases unacceptably the danger of criticality, melting of fuel, penetration of the walls of the spent fuel building, and serious damage to the environment and members of the public through subsequent radiation release." Id. Petitioner's claim easily falls within the scope of this proceeding. In other words, Petitioner seeks a determination as to whether an increase in the K-effective limit of Applicant's spent fuel pool from 0.90 to 0.95 for normal operations will pose a significant hazard to the public health or safety. The issue raised by Petitioner is in fact the precise issue that must be resolved in Applicants' favor before Applicants' application can receive final approval. Consequently,

the specific aspect of the subject matter for which intervention is sought is within the scope of this proceeding. ^{2/}

V. CONCLUSION

Although Mr. Doherty sets forth sufficient grounds to establish his standing to intervene in the proceeding and satisfies the specific aspect requirement, the petition for leave to intervene should not now be granted because a balancing of the factors listed in 10 C.F.R. § 2.714(a) does not weigh in favor of Petitioner's untimely petition. Consequently, the Board should either dismiss the petition or direct the Petitioner to (i) explain the reasons for failing to file the petition in a timely fashion and (ii) provide satisfactory information to enable the drawing of an informed inference that Petitioner can and will make a valuable contribution in this proceeding.

Respectfully submitted,


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Dated at Bethesda, Maryland
this 19th day of July, 1985

^{2/} Applicant points out that Petitioner "has yet to state 'one good contention'." Licensee's Answer at 8. While this may be true, the Staff notes that under the Commission's Rules of Practice, a petitioner is no longer required to state a good contention in its petition to intervene. See Consumers Power Company (Midland Plant, Units 1 and 2), LBP-78-27, 8 NRC 275, 277 (1978). Under the provisions of 10 C.F.R. § 2.714 now in effect, a petitioner is not required to submit contentions until 15 days prior to the special prehearing conference under 10 C.F.R. § 2.715a. Id.