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DOCKETED
October 15, 1996

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'96 OCT 16 P3:59

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of

NORTHERN STATES POWER COMPANY)	Docket No. 72-18-ISFSI
(Independent Spent)	
Fuel Storage Installation))	ASLBP No. 97-720-01-ISFSI

NRC STAFF'S RESPONSE TO PETITION FOR LEAVE TO INTERVENE
OF THE MINNESOTA DEPARTMENT OF PUBLIC SERVICE

INTRODUCTION

Pursuant to 10 C.F.R. § 2.714(c), the staff of the Nuclear Regulatory Commission (Staff) hereby submits its response to the September 25, 1996 petition for leave to intervene filed by the Minnesota Department of Public Service (Department). For the reasons set forth below, the Department's intervention petition does not satisfy the requirements of 10 C.F.R. § 2.714. The Department, however, should be permitted to participate as an interested state under 10 C.F.R. § 2.715(c), if another petition filed pursuant to 10 C.F.R. § 2.714, is granted in this proceeding.

BACKGROUND

On August 7, 1996, Northern States Power Company (NSP) applied for a license, pursuant to 10 C.F.R. Part 72, to possess spent fuel and other radioactive materials associated with spent fuel storage in an off-site independent spent fuel storage installation (ISFSI), located in Goodhue County, Minnesota. See Letter from Roger O. Anderson, Director, Licensing and Management Issues, Northern States Power Co., dated August 7, 1996. On September 17, 1996, the Staff published a "Notice of Consideration of Issuance of a Materials License for the Storage

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of Spent Fuel and Notice of Opportunity for a Hearing.” 61 Fed. Reg. 48,989 (1996). The Staff, in its notice, stated that the license, if granted, will authorize NSP to store spent fuel in a dry storage cask system at the off-site ISFSI that NSP proposes to construct and operate. *Id.* The notice further provided that by October 17, 1996, “any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene with respect to the subject materials license in accordance with the provisions of 10 C.F.R. 2.714.” *Id.* On September 25, 1996, the Department filed a timely “Petition for Leave to Intervene” (Petition). There have been no other intervention petitions received to date regarding the license application.

DISCUSSION

State agencies, and other governmental units, may choose to participate in Commission proceedings either as parties under 10 C.F.R. § 2.714, or as interested states or local governmental units under 10 C.F.R. § 2.715(c). If a state chooses to petition to intervene under section 2.714, like other petitioners, it must satisfy the Commission’s standards for intervention. *See Nuclear Fuel Services and New York State Atomic and Space Dev. Auth.* (West Valley Reprocessing Plant), ALAB-263, 1 NRC 208, 216 n.14 (1975) (there is no warrant in the Commission’s regulations for treating the intervention petition of a government body differently from that of a private person.); *see e.g. Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118 (1987) (Board found that Vermont and Massachusetts met the standing and aspects requirements of § 2.714 for intervention pursuant to that section). The Department’s petition for leave to intervene does not satisfy 10 C.F.R. § 2.714 of the Commission’s requirements. The Department, however, should be permitted to participate

as an interested state under 10 C.F.R. § 2.715(c), if another petition filed pursuant to 10 C.F.R. § 2.714, is granted and a hearing is granted in this proceeding.

A. The Department Has Failed to Establish Standing to Intervene

Section 189 of the Atomic Energy Act of 1954, as amended (AEA) provides that the Commission shall grant a hearing upon the request of any person "whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding." ¹ 42 U.S.C. § 2239. In determining whether a petitioner has established the requisite interest, the Commission has traditionally turned to judicial principles of standing. *Gulf States Utilities Co.*, (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47 (1994); *Cleveland Elec. Illuminating Co.*, (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993). In order to show standing, a petitioner must allege an injury in fact from the licensing action being challenged and that the injury impacts a recognizable interest protected by the statute giving rise to the action. The injury must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). In Commission proceedings, the injury must fall within the zone of interests sought to be protected by the AEA or the National Environmental Policy Act. *Metropolitan Edison Co.*, (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 316 (1985). Second, the injury must be fairly traceable to the challenged action. *Id.* Such a determination does not

¹ The term "person" in both the AEA and Part 2 of the Commission's regulations includes any state or any political subdivision of, or any political entity within a state. AEA § 11s; 10 C.F.R. § 2.4.

depend on whether the cause of the injury flows directly from the challenged action, but whether the chain of causation is plausible. *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 (1994). Third, it must be likely, rather than speculative, that a favorable decision will redress the injury. *Lujan*, 504 U.S. at 561; *Sequoyah*, 40 NRC at 71-72.

The Commission's regulations, at 10 C.F.R. § 2.714, provide that "[a]ny person whose interest may be affected by a proceeding and who desires to participate as a party shall file a written petition for leave to intervene." As provided in the Staff's September 17, 1996, *Federal Register* notice, the petition must set forth with particularity the interest of the petitioner in the proceeding, how the interest may be affected by the results of the proceeding, including the reasons why the petitioner should be permitted to intervene. 10 C.F.R. § 2.714(a)(2). The petitioner must also address the following three factors: the nature of the petitioner's right under the Act to be made a party to the proceeding; the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and the possible effect of any order that may be entered in the proceeding on the petitioner's interest. 10 C.F.R. § 2.714(d)(1). Finally, the petitioner must set forth the specific aspects of the subject matter of the proceeding as to which the petitioner wishes to intervene. 10 C.F.R. § 2.714(a)(2); see *Consumers Power Co.*, (Midland Plant, Units 1 and 2), LBP-78-20, 8 NRC 275, 278-79 (1978) (State of Michigan denied intervention under section 2.714 for failure to specify aspects)

The Department has neither demonstrated standing or set forth the specific aspect of the subject matter of the proceeding as to which it seeks intervention. See 10 C.F.R. § 2.714(a)(2). Nowhere in its Petition does the Department allege an injury in fact from the licensing action or

even state that it stands in opposition to the grant of the application. The Department states only that "through the status given it as the representative of Minnesota residents, businesses, and governments . . . [it] represents consumers who have interests which may be directly and substantially affected by the outcome of the proceeding" and that "[a]s a state agency, the Department has a direct interest in this proceeding" Petition at 4. However, absent an allegation of a "concrete and particularized" injury in fact that is "fairly traceable to the proposed action," the Petition is deficient in that it does not establish standing. *See Lujan* at 560 ("core component of standing is an essential and unchanging part of the case-or-controversy requirement of [the Constitution]"). Furthermore, the economic interest of ratepayers does not fall within the zone of interest protected by the AEA, and, thus, is insufficient to establish standing as a matter of right. *See Portland General Elec. Co. (Pebble Springs Nuclear Plant, Units 1 and 2)*, CLI-76-27, 4 NRC 610, 614 (1976). Consequently, the Department has not set forth an injury in fact, and has not specified an interest cognizable under the AEA or other relevant statute, has not specified in accordance with 10 C.F.R. § 2.714, how such interest would be affected by the proceeding, how any order would affect its interest, and an aspect of the proceeding in which it seeks to intervene.

B. The Department Cannot Yet Participate as an Interested State.

The Department states that the NRC is directed under the Atomic Energy Act, to afford a reasonable opportunity for State representatives "to participate in license applications pending before the NRC." Intervention Petition at 4. The provision of the Atomic Energy Act to which the Department cites specifically provides that the Commission "shall afford reasonable opportunity for State representatives to offer evidence, interrogate witnesses, and advise the

Commission as to the application without requiring such representatives to take a position for or against the granting of the application." Atomic Energy Act of 1954, as amended, (AEA), section 274(l), 42 U.S.C. 2021; *see* 10 C.F.R. § 2.715(c). A governmental body seeking to be admitted as an interested state is not required to set forth contentions as a condition of its participation, but must observe procedural requirements that apply to others. *See Gulf States Utility Co.* (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 768 (1977). Although it did not request participation pursuant to 10 C.F.R. § 2.715(c), the Department would be entitled to such participation should it wish to do so, and should a party be admitted to the proceeding so that a hearing may be conducted. *See Northern States Power Co.* (Tyrone Energy Park, Unit 1), CLI-80-36, 12 NRC 523, 527 (1980) (a request by a state or state agency under 2.715(c) to participate in licensing hearings does not itself trigger a hearing).

CONCLUSION

For the reasons set forth above, the Department's intervention petition fails to satisfy the requirements of 10 C.F.R. § 2.714, but the Department should be permitted to participate as an interested state, pursuant to 10 C.F.R. § 2.715(c), if another petition filed pursuant to 10 C.F.R. § 2.714 is granted.

Respectfully submitted,

Catherine L. Marco

Catherine L. Marco
Counsel for NRC Staff

Dated this 15th day of October, 1996
at Rockville, Maryland

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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(Independent Spent Fuel Storage Installation)

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Docket No. 72-18-ISFSI

ASLBP No. 97-720-01-ISIFI

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney enters an appearance in the above-captioned matter. In accordance with § 2.713(b), 10 C.F.R., Part 2, the following information is provided:

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Name of Party:

NRC Staff

Respectfully submitted,

Catherine L. Marco

Catherine L. Marco
Counsel for NRC Staff

Dated in Rockville, Maryland
this 15th day of October, 1996.

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USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney enters an appearance in the above-captioned matter. In accordance with § 2.713(b), 10 C.F.R., Part 2, the following information is provided:

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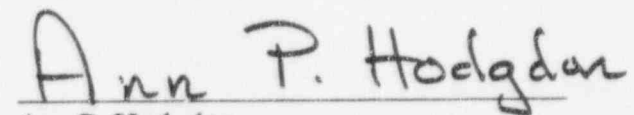
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NRC Staff

Respectfully submitted,



Ann P. Hodgdon
Counsel for NRC Staff

Dated at Rockville, Maryland
this 15th day of October, 1996.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S RESPONSE TO PETITION FOR LEAVE TO INTERVENE OF THE MINNESOTA DEPARTMENT OF PUBLIC SERVICE" and "NOTICE OF APPEARANCE" for Catherine L. Marco and Ann P. Hodgdon in the above-captioned matter have been served on the following by deposit in the United States mail, first class, as indicated by asterisk or through deposit in the Nuclear Regulatory Commission's internal mail system this 15th day of October, 1996:

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